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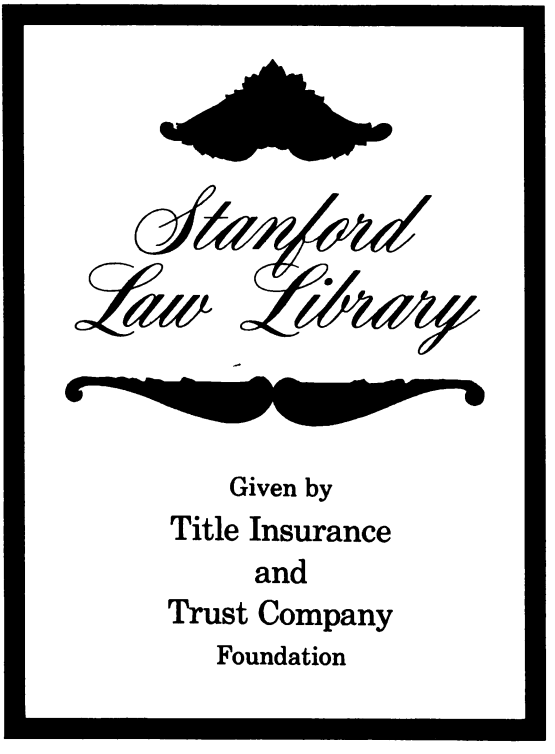
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THE LAW OF PERPETUITIES IN BRITISH INDIA.

BY

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Calcutta:
THACKER, SPINK & CO.

1902.

V. KALYANARAMA IYER & CO.,
BOOK-SELLERS, MADRAS.

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THE LAW OF PERPETUITIES IN BRITISH INDIA.

LECTURE I.

THE LAW OF PERPETUITIES—ITS NATURE AND PLACE IN JURISPRUDENCE.

Difficulty of the subject.

IT has been usual with writers of eminence on the Law of Perpetuities, to dwell not only on the importance but also on the difficulty of the subject. In a country where, with the gradual decay of its industries, land has become the principal store-house of national wealth, the importance of the study of the laws which regulate its disposition, can hardly be overestimated ; but I venture to think that the obscurity which has been supposed to pervade the subject, has been somewhat exaggerated. No one with an adequate knowledge of the manifold problems which demand our attention in this field of enquiry, will maintain for a moment that the subject is wholly free from difficulties, or that the difficulties which present themselves can always be satisfactorily solved. When, however, we come to examine the difficulties, we find that they are traceable, not to anything mysterious or unintelligible in the nature of the subject, but rather to the fact that the authorities we have to rely upon are, on the one hand, so fragmentary and unsystematic as to be easily

liable to misinterpretation, and, on the other, so varied in extent and diverse in character as to make it exceptionally hard to co-ordinate and harmonize them. It would serve no useful purpose if I were to lay before you a dry catalogue of these authorities ; I wish you only to bear in mind that they can never be studied with profit or pleasure unless you have a clear conception of the manner in which the laws regulating the disposition of land have developed with the progress of civilization. I purpose, therefore, in this introductory lecture, to sketch in outline the historical development of the ideas relating to land, and thus to determine the nature of the Law of Perpetuities and its place in Jurisprudence.

True object of the Law of Perpetuities.

The Law of Perpetuities, as I have just indicated, is a branch of the law of property, and its true object is to restrain the creation of future conditional interests ; it has been a famous topic of controversy among eminent jurists, whether or not the Law of Perpetuities also aims at the prevention of the non-alienation of property. I must reserve a discussion of th isinteresting question for the present, but it is manifest that whether the one or the other be the true object of the Law of Perpetuities or whether they both be objects of the law, each deducible reciprocally from the other, it can find no possible place in systems of Jurisprudence to which the idea of individual ownership is unknown. Indeed, it is difficult to conceive of a Law of Perpetuities before the development of the idea of individual ownership and its necessary concomitants, namely, the ideas of the right of alienation of property and the right of testamentary disposition. It is, therefore, by no means a matter of surprise that the laws of archaic communities show but the faintest traces, if any, of a Law of Perpetuities.

History of ownership in land.

Those of you who are familiar with the brilliant researches of Sir Henry Maine in the domain of Comparative Jurisprudence,— researches which have done so much to illuminate many a dark corner in the history of law—

cannot have failed to remark that the history of ownership in land, so far as there are materials available for a study of it with reference to different countries and different ages, has pursued one unvarying course. Commencing with community of tribal possession, land has everywhere been, by imperceptible degrees, appropriated to the village, the family, and the individual. Of the earliest ages when men lived solely on wild fruit or on the produce of the chase, we have no contemporary historical records to rely upon ; but, so far as may fairly be judged from the habits and character of existing races who are still in the lowest scale of civilization, for instance, the Red Indians of North America or the Tartars who people the Steppes of Central Asia, we are entitled to say that in the remotest antiquity, division of tribes involved distinction of territory. Each tribe jealously guarded its own territory from intrusion by others, but, within its own range, all the members had equal and unrestricted right of user. This principle of absolute exclusion as regards strangers, and of absolute equality as regards members of the tribe, is really not so very striking as it may appear at first sight to be ; thus, for instance, when you remember that all modern nations claim a special ownership in fisheries within a certain distance of their shores, and at the same time allow their subjects a common right to fish in the waters thus reserved, you will perceive that this apparently archaic idea still survives amongst all civilized people.

Tribal ownership.

But the higher races gradually progressed beyond this primitive stage of tribal occupation of land, and by the early discovery of agriculture which afforded an ampler means of industrial existence than the bare natural produce of the earth, approached to more settled habits of life ; and it is to this transition that we must trace the formation of the family and the village community. It is needless to enter here into an examination of the controversy, whether the village community was formed by the expansion of the family, or the family was formed by the dissolution of the village community ; so far as I have been

Transition to family and village community.

able to examine the evidence, both the processes seem to have been at work under varying conditions, and many of the erroneous statements on the subject are undoubtedly due to an attempt to apply one uniform theory to widely different circumstances. Be that as it may, it is not difficult to obtain a tolerably accurate idea of the territorial relations of the village community, from the descriptions given of it by contemporary observers of antiquity, and from the illustrations of its survival in modern times. The village community, then, in the first place, was a body of men who were descended from a common ancestor, at any rate so far as the principal members were concerned, and who were united by a common religion essentially commemorative of that descent. But in addition to this primary religious tie, and to some extent dependent upon it, was the further tie to which their community of land gave rise. The land belonged to the community, and the community was settled upon the land; an individual, therefore, was not a member of the community because he lived upon or owned the land; but he lived upon the land and had interest in it, because he was a member of the community. This secondary tie, which in many instances survived the old religious tie, was originally threefold: the members of the community lived together; they held joint interest in landed property; they managed, for certain purposes, that property in common; they were, thus, at once, kinsmen, neighbours, co-owners and partners. But, though their connection was so intimate, you must not assume that their individuality was completely lost. Within the community, each family had its separate worship, its separate hearth, its separate property, and, consequently, separate administration of that property. In an archaic community, therefore, there were two classes of conditions distinctly marked out; the family, except as to property in land, was absolutely free from all external control; the father of the family could do what he liked with his own; neither the community as a whole,

Territorial relations of the village community.

Community of descent.

Community of religion.

Community of land.

Individuality still retained.

Constitution of the family.

nor any member of it, had any control over his domestic management; such an interference would have seemed to the archaic mind an unauthorized intrusion, and would have challenged his just resentment. But outside the pale of the family, the charmed circle within which, like the Cyclops of the poet, he laid down the law to his wife and children, the father was no longer independent; on the contrary, his freedom of action was fenced in by stringent rules framed in the interests of the other members of the community. It was in this manner that entire countries were originally inhabited by independent groups of men, united or supposed to be united by some personal tie, whether of blood, of religion, or of both, and occupying collectively each its own portion of land.

Indian village communities.

The early Hindu authorities furnish no systematic information regarding the primitive stages in the development of the law of property which we have been considering, and we have to rely entirely upon scattered texts to prove the existence of the village system. I do not intend to enter here into a detailed examination of these texts, but the general result of the early authorities may be briefly stated to be, that the country was inhabited throughout by a multitude of small, independent, self-acting, organized, social groups of the type I have endeavoured to describe above. They were subordinate to the supreme authority vested in an absolute monarch who was entitled to receive a share of all agricultural produce, the amount of which varied, not only according to the character of the soil, but also according to the ever-changing needs of the paramount power. But there can be little doubt that, subject to this payment of revenue—which was usually done through a headman, who was originally the king's agent and removable at his pleasure, but whose office, like every other Oriental office, gradually tended to become hereditary,—the ownership in the soil was vested in the village communities, the principle of whose being was separation as regards one another, and the most intimate union as regards the individual members

Introduction of strangers.

of each. This characteristic homogeneousness, however, could obviously be maintained only so long as the integrity of the community was not destroyed by the inevitable introduction of strangers. It would be idle to affirm positively in what way this was at first effected ; perhaps the growth of the idea of individual property led to the transfer of their shares by individual members of the community, a process undoubtedly regarded with jealousy in primitive ages, but gradually acquiesced in ; possibly, the operation was facilitated by the employment as labourers of men outside the kin, to clear and cultivate lands which the community found itself unable to bring under tillage. But without hazarding a definite opinion as to the precise causes of the incorporation of strangers into the community, it may safely be asserted that in many archaic communities, this phenomenon was contemporary with the growth of the idea of individual ownership.

Examples of village communities.

It is interesting to note that the original type of the village community we have been describing, may still be observed in different parts of the country in various

Tod.

stages of development or decay. Thus, Colonel Tod[1] observes that every Rajput State presents the picture of so many hundred or thousand minute republics, without any connection with each other, owning allegiance and paying rent to a prince who neither legislates for them,

Hunter.

nor provides for their protection. Sir William Hunter[2] found some of the remote hill districts of Orissa, where the Mahomedan and British systems of law never seem to have penetrated, exhibit an almost perfect picture of the primitive Aryan commonwealth. This remarkable persistency of the village community, which proves conclusively that the conception was deeply rooted in the popular mind, has been so graphically described by an eminent Indian statesman, that no apology is needed for citing an extract

Metcalfe.

from his writings. "The village communities are little republics having nearly everything they can want within

[1] Rajasthan, Vol. I, p. 495.

[2] Orissa, Vol. I, p. 32.

themselves, and almost independent of any foreign relations. They seem to last where nothing else lasts. Dynasty after dynasty tumbles down ; revolution succeeds revolution. Hindu, Pathan, Mogul, Mahratta, Sikh, English are all masters in turn ; but the village community remains the same. In time of trouble they arm and fortify themselves ; a hostile army passes through the country ; the village community collect their cattle within their walls and let the enemy pass unprovoked. If plunder and devastation be directed against themselves, and the force employed be irresistible, they flee to friendly villages at a distance ; but when the storm is passed over, they return and resume their occupations. If a country remain for a series of years the scene of continued pillage and massacre, so that the villages cannot be inhabited, the scattered villagers, nevertheless, return whenever the power of peaceable possession revives. A generation may pass away, but the succeeding generation will return. The sons will take the places of the fathers ; the same site for the village, the same positions for the houses, the same lands will be re-occupied by the descendants of those who were turned out when the village was depopulated : and it is not a trifling matter which will drive them out, for they will often maintain their post through times of disturbance and convulsion, and acquire strength sufficient to resist pillage and oppression with success."[1]

Joint ownership in land in other countries.

The description I have just given of joint ownership in land, though primarily applicable to India, is true of all Aryan countries, so far as history has been able to trace the development of the notion of property with the progress of civilization. A people to whom agriculture, towns and money are equally unknown, cannot possess a developed law of property, for lack of agriculture means lack of landed property, and lack of money necessarily implies lack of commerce, and thus it would be idle to expect a well-developed law of property in the absence of

[1] Sir Charles Metcalfe. Report of the Select Committee of the House of Commons, 1832, Vol. III, p. 331.

two of the most important sources of that law. If we seek for illustrations outside our own country, it is not difficult to show that the origin of Aryan property has been practically identical in widely different communities.

Maine.

Sir Henry Maine when confronted by the question, "why do men respect other men's property," pointed out that this question coincides with the other question "why did men live under the system of the family." That eminent jurist, however, thought that the problem was insoluble and that, at any rate, jurisprudence has no answer for it. I venture to think, however, that Sir Henry Maine somewhat underrated the resources of the science of which he was so distinguished a student and that historical jurisprudence is not silent in the presence of this great problem. If Sir Henry Maine had not in company with the majority of British jurists, unduly slighted the theory of ancestor-worship which was so clearly set forth by the brilliant historian of law, Fustel De Coulanges, he would not have found it necessary to abandon all enquiry in this branch of his subject. This learned French author in his powerful exposition of the constitution of the Ancient City, points out that, in archaic times as the household depended upon the house-spirit, so the respect for another's property was due to the respect for the spirits which guarded that property. In other words, religion was the basis as well of the institution of property as of every other archaic institution; and so deep-rooted was the religious instinct, that the habit or sentiment of respect for property, which was thus generated by the family system, acquired sufficient strength to stand alone even when the original force was withdrawn. It follows, therefore, that property is a custom; in civilized state that custom has been adopted and enforced by law, but the origin of the custom thus legalized is traceable to ancestor worship.

Fustel de Coulanges.

Ancestor worship.

Theories of the origin of property.

You must not suppose, however, that the description I have given of the religious origin of property and of its primitive type is universally applicable. Writers of

eminence whose opinion is based upon incontrovertible evidence have given a very different account of the origin of property and of the process by which the joint ownership of primitive ages was gradually transformed into the individual ownership of the modern world. The most illustrious exponent of this school of writers is Mr. Herbert Spencer,[1] whose theory, from the very eminence of his name, deserves more than a passing notice. According to him, the desire to appropriate and to keep that which has been appropriated, lies deep not only in human nature, but in animal nature generally. But although property necessarily implies appropriation, this by itself would not be enough; as Green[2] points out, there must also be a recognition, tacit or express, of that appropriation by others. The consciousness that conflict and consequent injury may probably result from the endeavour to take that which is held by another, always tends to establish and strengthen the custom of leaving each person in possession of what he has obtained by labour; and this custom takes, among primitive men, the shape of an overtly admitted claim. In other words, this recognition of the title of the appropriator, which lies at the root of the notion of property, is not derived from contract as Grotius[3] would have it, nor is it derived from supreme force as Hobbes[4] put it, but it is based upon the consciousness of a common interest to which each man recognises every other man as contributory. This claim to private ownership, primitively recognized in respect of movables and game killed, was not recognized in respect of tracts of territory; and the reason is not far to seek; for property could be individualized only in so far as circumstances allowed individual claims to be marked off with some definiteness. Consequently, in the earliest ages, it was not individualized in respect of land, because, under the conditions, no individual claims could be shown or could be effectually marked

Herbert Spencer.

Green.

Grotius.

Hobbes

Private ownership originally limited to movables.

[1] Principles of Sociology.

[2] Principles of Political Obligation, § 214.

[3] De Jure, Book II, Chap. ii, § 5.

[4] Leviathan, Part II, Chap. XV, XVIII.

off even if they were shown. But as society gradually progresses from a nomadic to a settled state, ownership of land by the community becomes qualified by individual ownership, though, at first, only to the extent that those who clear and cultivate portions of the surface, have undisturbed enjoyment of the produce. Habitually, the public claim, the claim of the State, survives ; and, either when after a few crops, the cleared tract is abandoned, or when after transmission to descendants, it has ceased to be used by them, it reverts to the community. Where, however, the patriarchal form of organization has been carried from the pastoral into the settled state, and, sanctified by tradition, is also maintained for purposes of mutual protection, possession of land partly by the clan and partly by the family, long continues, side by side with the separate possession of things produced by separate labour. Thus while in some cases, the communal land-ownership or family land-ownership survives, in others it yields in various modes and degrees, to qualified forms of private ownership, mostly temporary, and subject to supreme ownership by the public. But war, both by producing class differentiations within each society, and, by effecting the subjugation of one society by another, undermines and ultimately destroys communal proprietorship of land ; and, partly or wholly, substitutes for it, either the unqualified proprietorship of an absolute conqueror, or proprietorship by a conqueror, qualified by the claims of vassals whose claims are, in turn, qualified by those of dependents attached to the soil. In other words, the system of status which militancy develops, involves a graduated ownership of land, as it involves a graduated ownership of persons. The individualization of ownership, once thus effected by war, is, in its turn, strengthened and developed by the industrial progress of the community which follows when war has ceased. Accumulation of movables, privately possessed, increases as militancy is restrained by growing industrialism ; the growth of industrialism necessarily pre-supposes improved facilities

Next extended to produce of land.

Period of transition.

War destructive of joint ownership.

Effect of industrial progress.

for disposing of industrial products, there comes along with it measures of quantity and value promoting exchange, and finally the more pacific state of society implied by the growth of industry, renders it safe for men to detach themselves from the groups in which they previously kept together for mutual protection. The individualization of ownership, thus extended and made more definite by commercial transactions, eventually affects the ownership of land; for, bought and sold by measure and for money, land is assimilated in this respect to personal property produced by labour, and becomes, in the popular mind, confounded with it. But, while private possession of things produced by labour may grow even more definite and sacred than at present, the inhabited area, which is our patrimony and cannot be produced by labour, must ever continue subject to the paramount ownership of the State.

Growth of the right of alienation.

I have now traced in outline the transition from corporate to individual ownership; I have pointed out to you that this was the inevitable result of the disintegration of the patriarchal family and the emancipation of the individual members from the rule of the pater-familias; in other words, the history of individual property coincides with the history of individual liberty. Nowhere has this phenomenon been better illustrated than in India, where the primitive joint-tenancy of the Mitakshara type has been converted into the tenancy in common of the Dayabhaga School. A necessary consequence of this transformation from corporate to individual ownership was the growth of the right of alienation; originally, no doubt, a sale of the family property was prohibited or rather unheard of; gradually it was allowed with the consent of the community who, as the ultimate heirs, had a direct interest in such a transaction; later on, as the exigencies of social life grew more and more urgent, such sales came to be considered as permissible in cases of necessity; and, finally, the right of alienation became habitual and comparatively easy.

Growth of the idea of testamentary disposition.

The next stage in the progress of the ideas relative to the disposition of land was reached with the development of the idea of testamentary disposition. The researches of Sir Henry Maine have, no doubt, made you familiar with the doctrine that the testament was at one time a means for continuing the universal succession, at another time it was a means for distributing the testator's property; or, to put it in the language of the Roman jurists, a testament was either a method of appointing a *heres*, or universal successor, or it was a method of providing for the payment of legacies and charges on the property. How the one object was related to the other, and by what steps the modern will was developed from its archaic prototype, I must resist the temptation to discuss at length, as I am not now lecturing to you on the history of Law. You will remember, however, that the primitive notion of a will was inextricably mixed up and confounded with the theory of a man's posthumous existence in the person of his heir, that is to say, the notion was founded upon a fictitious identification between the deceased and his successor. Primarily, then, the primitive testator, in exercising his function, simply nominated his successor, the person who was to sustain his *persona* or the aggregate of his family rights and duties; and it was only very slowly and imperceptibly that this operation was turned into a means of exercising the right of disposition over one's property, even after that property had ceased to be subject to his physical control by reason of his death. The view which I have set forth as to the history of the origin of wills is the one ordinarily adopted by English jurists and has also been held applicable to India in a celebrated judgment of the Privy Council.[1] It would be hardly fair, however, not to tell you that the opposite view has been taken by an eminent American historian of law, Chief Justice Holmes,[2] who maintains that the law of wills was not developed out of the law of gifts and conveyances, but

Maine.

Holmes.

[1] *Tagore* v. *Tagore* (1872), L. R., I. A., Sup. Vol., 47 (68); S. C., 9 B. L. R., 377, 18 W. R., 352.

[2] Common Law, Lecture X.

rather that freedom of alienation grew up by a gradually increased latitude in the choice of successors; in other words, the right of alienation was not the cause, but the consequence of the right of testamentary disposition. It is not necessary for me to enter here into a detailed examination of this thesis, for whether the law applicable primarily to persons taking by descent was extended to persons taking by purchase, by reason of fictitious identification of the transferee with his transferor, or, whether the early form of instituting a heir was nothing more than a particular application of a previously familiar notion of conveyance to the sale of the *familia* or headship of the family to the intended heir, it is immaterial for our present purpose to enquire; it is enough for us to observe the co-existence of the right of alienation with the right of testamentary disposition and note the consequence thereof.

Full ownership in land.

We have now arrived at a state of society where the individual is vested with the full ownership of land, which entitles him to do as he likes with his property during his life, to bequeath it to whom he pleases on his death, and effectually to exclude all other persons from dealing with it in any way or in any circumstances; in other words, as Austin[1] puts it, the full owner's right over his property is indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration. But, although the full owner is clothed with the right of alienation which entitles him to transfer the privileges of ownership to the person of his choice, although the full owner is clothed with the right of testamentary disposition which entitles him to bequeath his property at the moment of his death to the successor of his choice, the question necessarily arises, whether it is beneficial to the community further to extend these powers. For, as Domat[2] puts it, inheritance is a rule laid down by the State, not merely for the

Austin.

Domat.

[1] Jurisprudence, Vol. II, p. 477.

[2] Civil Law, § 2413, (1853), Vol. II, p. 5; (1737), Vol. I, p. 518.

benefit of individuals, but for reasons of public policy. The problem, therefore, we have to face is, how far is any individual who has possessed a particular piece of property for a number of years, entitled to say that he has authority to impose fetters upon it to bind his successors for generations. It would not be profitable for us to discuss here the motives which induce land-owners to impose such restraints ; but we may take it as a well ascertained fact, that great land-owners who enjoy this freedom of alienation and devise, jealously guard against the possibility of the exercise of similar powers by their successors. To preserve the family name and position, to keep the land in the family, seems so desirable and even so laudable an object, that they do their best to contrive restraints on alienation and succession, when the property passes into the hands of successive generations. It is just here that law steps in, upon grounds of public policy, and, in the interest of the community, to prevent the creation of remote interests in property and the imposition of unlimited restraints upon its alienation. It would be out of place to enter here upon an examination of the grounds which may be urged in justification of this interference on the part of the State, and I must resist the temptation of discussing the question of natural rights, and the relation between the individual and the State ; for our present purposes, apart from all sociological questions, we must start with the proposition that, as the right of disposal of property is a creature of political necessity, its exercise must be subject to such restrictions as best answer the objects for which society exists. Now, in proportion as civilization advances and with it trade and commerce, the great fountains of wealth, in the very same proportion will the necessity for the free and easy circulation and transmission of property be manifest ; or, as Sir William Blackstone[1] puts it, property best answers the purposes of civil life, specially in

State interference.

Unlimited imposition of restraints why not permissible.

Blackstone.

[1] 2 Commentaries, 174.

commercial countries, when its transfer and circulation are totally free and unrestrained. Whether or not this is sound from the economist's point of view, it is not for me to judge ; it is enough for us to know that this is one of the fundamental axioms, which is accepted throughout the modern civilized world, and every disposition of property which contravenes this political maxim, is regarded as against the "policy of the law." I will not attempt to define this mysterious phrase, but we may say generally that by policy of the law are meant those principles of jurisprudence which underlie and form the basis of the institutions of the country, and which may perhaps be more correctly considered as matters of public policy rather than of technical law. As an eminent English judge once said, "You cannot lay down any definition of the term public policy, or say, it comprises such and such a proposition and does not comprise such and such another ; that must be to a great extent a matter of individual opinion, because what one man or one judge and perhaps I ought to say, one woman also, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a judge might be of what public policy is."[1] We shall assume then that it is excellent public policy to promote the circulation of property in commercial countries. Nor can you say that this is a very large assumption to make ; for the necessity of imposing some restraint on the power of protracting the acquisition of absolute interest in property will be obvious if you consider for a moment what would be the state of a community in which a considerable proportion of the land and capital was locked up. "That free and active circulation of property which is one of the springs as well as the consequences of commerce would be obstructed ; the improvement of land checked ; its acquisition rendered difficult; the capital of the country

Public policy.

Jarman.

[1] *Per* Sir George Jessel, M. R., 605 (620). in *Besant* v. *Wood* (1879), 12 Ch. D.

gradually withdrawn from trade ; and the incentives to exertion in every branch of industry diminished. Such a state of things would be utterly inconsistent with national prosperity ; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, would be baneful to all."[1] I know of no writer who has more vividly described than Lord Bacon has done, the motives which induce men to create future interests in property and to impose restraints upon its alienation and the consequences thereof. I shall, therefore, take the liberty of quoting to you the very forcible though somewhat quaint language of the celebrated argument in Chudleigh's case.[2] " It is a wisdom and foresight for every man to imagine of that which may happen to his posterity and by all ways establish his name. To this I answer, that it is a wisdom, but a greater than even Solomon aspired after. For I find that he uses other language when he says that he must leave the fruit of his labour to one of whom he does not know, if he shall be a fool or a wise man. And yet does he say that he shall be an usufructuary or tenant restrained in a perpetuity ? No, but the absolute lord of all that he had by his travail." Of the evils of a perpetuity, Bacon says : " A man is taken prisoner in war. Life and liberty are more precious than lands or goods. For his ransom it is necessary for him to sell. If he be then shackled in his conveyances, he is as much captive to his conveyances as to his enemy and so must die in misery to make his son and heir after him live in jollity. Some young heir when he first comes to the float of his living out-compasseth himself in expenses, yet perhaps in good time reclaims himself, and has a desire to recover his estate ; but has no readier way than to sell a parcel to free himself from the biting and consuming interest. But now he cannot redeem himself with his proper means, and though he be reclaimed in mind, yet

Bacon.

[1] 1 Jarman on Wills, 213.

[2] 7 Bacon, 632.

can he not remedy his estate. So passing over the considerations of humanity, let us now consider the discipline of families. And touching this I will speak in modesty and under correction. Though I reverence the laws of my country, yet I observe one defect in them; and that is, there is no footstep of the reverend *potestas patria* which was so commended in ancient times. This only yet remains: if the father has any patrimony and the son be disobedient, he may disinherit him; if he will not deserve his blessing, he shall not have his living. But this device of perpetuities has taken this power from the father likewise and has tied and made subject (as the proverb is) the parents to their cradle, and so notwithstanding he has the curse of his father, yet he shall have the land of his grandfather."

Summary. I have now explained to you, as clearly as I could, the nature of the law of perpetuities and its place in jurisprudence; I have pointed out to you that there is no possible occasion for it in primitive and archaic systems of law, that in reality its evolution has been contemporaneous with the growth of the conception of individual ownership, of the right of alienation, and of testamentary disposition. I have further explained to you that the chief inducements to the creation of perpetuities are the desire of preventing prodigality in our descendants, the desire of ruling after death, and last, but not least, family pride, joined to that agreeable illusion which paints the successive existence of our descendants as the prolongation of our own; our imagination is not satisfied with the idea of leaving our children the same value; they must possess the same lands, the same houses, the same natural objects, for this continuity of possession appears a continuity of enjoyment, and gives support to a feeling chimerical and absurd.[1] Lastly, I have examined the principles of public policy which form the foundation of the law, and I have dwelt on the dangers which would inevitably result if

[1] Bentham, Theory of Legislation, p. 175.

perpetuities were allowed to take property out of commerce and thus prevent the circulation of the riches of the kingdom. You will see, therefore, from what I have just stated that a perpetuity could arise in two ways, first, by taking away from the owner the power to alienate property; and, secondly, by allowing the creation of remote future interests. In the early stages of the development of the law, these ideas were confounded, but gradually when they were differentiated, the first gave rise to the rule forbidding restraints on alienation, the second gave rise to the rule against remoteness which is miscalled the rule against perpetuities. When this differentiation had been effected, it was inevitable that a further question should arise, whether the second rule is merely a form of the first; in other words, is a remote future interest objectionable only because for too long a period there may be no one who can give a good title, or, is it objectionable also because the policy of the law does not allow interests so uncertain in value to hamper a present ownership. Under many circumstances, whichever principle was applied, the result would be the same; but, finally, cases arose which made a decision of the question imperative. This is the problem upon the solution of which eminent judges have been divided in opinion, and for obvious reasons I must reserve a discussion of it till I come to that branch of the law of perpetuities which treats of restraints on the alienation of property. For the present, I must ask you carefully to bear in mind the broad and well-marked distinction which I have just indicated between the two divisions of the law of perpetuities, namely, the rule against remoteness, and the rule against restraints on the alienation of property; this fundamental distinction has been, to the great reproach of our law, sometimes overlooked, and the consequence has been frequent lapses into error, from which the courts have recovered themselves slowly and painfully. Indeed, if you will follow me patiently to the end of the present course of lectures, you will discover that the study and

Two-fold origin of perpetuities.

practice of the law of perpetuities is, indeed, a constant school of modesty ; it would be by no means difficult to frame a long list of the blunders with regard to its questions made by eminent lawyers, blunders which they themselves have been sometimes the first to acknowledge. It will consequently be necessary, as you proceed, to examine cautiously even the opinions of eminent judges in a spirit of criticism which would be possibly unbecoming in other branches of the law, for here, at any rate, if nowhere else, even a lawyer imbued with superstitious reverence for authorities may take his motto from Voltaire, that "An open-minded hospitality for new reasons is essential to intellectual advance."

LECTURE II.

The Rule against Perpetuities—Its Origin and History in English Law.

Summary of the last ecture.

In the last lecture, we were engaged in an examination of the nature of the Law of Perpetuities and of the precise place it occupies in jurisprudence. You will remember, I pointed out to you, that a consideration of the provisions of various archaic systems of law, leads us to the conclusion that the notion of individual ownership has been in all communities a product of extremely slow growth. At the same time, you will not forget that wherever this idea of individual ownership was well developed, the right of alienation, *inter vivos* and by testamentary disposition, was carried to an extreme, and every effort was made to allow the grasp of the dead hand to be kept on the land of the living. But, as might have been anticipated, this naturally produced a reaction; a great land-owner, possessed of wealth and property, and vested with an absolute power of disposal, might not only alienate it freely during his life, devise it at his death to the successor of his choice, but, from a desire to preserve his family name and position, might leave directions as to the mode and manner of enjoyment of the property by successive generations, and might even seek to impress upon it a new law of succession. Yet, such a state of things, however gratifying it might be to the individual owner, could hardly be looked upon with favour by his successors who might not always have reverence enough to believe in his absolute wisdom in the matter of the disposition of his property for the benefit of generations unborn; at the

same time, courts of law would not be slow in their endeavour to protect the interests of the community by a persistent refusal to recognize many of these attempted restraints which render land "incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life for which property was first established."[1] To this abuse, then, of the unlimited right of alienation and devise, to this inexplicable desire on the part of the individual proprietor, himself vested with the most absolute right of disposition, to fetter the disposition of the property in the hands of successive generations, it is to this that we must trace the origin of those wholesome rules which regulate the creation of future interests, and the imposition of restraints on the alienation of property. In the present lecture, we purpose to trace in outline the origin and history of the rule against Perpetuities in English law.

Rule against perpetuities originated by Chancellors.

The history of the origin of the rule against Perpetuities in English law furnishes an excellent illustration of the anomalous way in which much of that system has been developed. The rule exists independently of Statute law, and no trace of it can apparently be found in any Act of Parliament. Like many other wholesome principles with which we are now familiar in English jurisprudence, it owes its origin to the great Chancellors whose function it was to moderate the rigour and remove the anomalies of the common law.[2] But nothing would be a greater

[1] 2 Blackstone's Commentaries, 174.

[2] "Then, there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other" (restraint on anticipation or alienation which was allowed in the case of a married woman), "and was this time in favour of alienation and not against it. The law does not recognise dispositions which would practically make property inalienable for ever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the Chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The result was that the Chancellors established this rule in favour of

mistake than to suppose that we could lay our finger on any particular decision of the Chancellors and say that here the rule against Perpetuities first saw light. In law, and specially in those departments of law which owe their development mainly to judicial exposition, the assertion may be safely hazarded that there are no sudden starts, no absolute beginnings—an assertion which is strictly true not only of the world of organic generation, but also of the world of intellectual production. Fix where we may the origin of this or that legal doctrine or idea, the patient historian of legal institutions will discover some earlier anticipation. While, therefore, it would serve no useful purpose to place before you a detailed examination of the earliest cases in which the doctrine of Perpetuities was directly or indirectly considered, I must ask you carefully to study the leading cases on the subject, cases which may rightly be regarded as marking out the successive epochs in the development of the rule. And if you read the story of this development intelligently, you will find that the results of the earlier cases in which the doctrine is dimly shadowed forth, have become embodied in the structure, raised by the later Chancellors, not as the stray carved corner of some older edifice, to be found here or there amid the new, but rather like minute relics of earlier organic life imbedded in the very stone they built with.

No absolute beginnings in law.

Leading cases mark successive epochs.

Those of you who have a familiar knowledge of the elements of the history and principles of English law,—knowledge which may easily be acquired, for instance, from the

Remote bequests seldom made in early times.

alienation, that property could not be tied up longer than for a life in being and twenty-one years after. That is called the rule against perpetuities. This rule, therefore, was established directly in favour of alienation: it merely carried out the principle of law that property is alienable. Similarly, in the case of executory interest, the law put a limit or fetter upon the testamentary power. The theory of both rules is, however, the same, namely, that property is alienable, though it may be made inalienable to a certain extent and in a peculiar way." *Per* Jessel, M. R., *In re Ridley* (1879), 11 Ch. D., 645 (649).

now neglected commentaries of Sir William Blackstone,[1] — will see without difficulty that questions of remoteness in the creation of estates and interests could hardly require decision before the enactment of the Statute of Uses[2] and the Statute of Wills.[3] And the reason is not far to seek; in those days, incorporeal hereditaments were seldom created to take effect in future; terms for years were, in the majority of instances, short, present terms; executory devises under powers given to executors, were necessarily rare, as they could arise only in the few localities where land was devisable by custom; and contingent remainders, with all its subtle learning, was for a long time unknown to the law.[4] Indeed, if Mr. Williams is correct in his conclusion, even up to the middle of the sixteenth century, in all marriage settlements, the remainders appear to be uniformly vested, the estates tail being given to living parties and not to sons or daughters unborn.[5] The circumstances I have mentioned would be sufficient to explain why questions of remoteness in the creation of estates and interests rarely called for judicial decision before the middle of the sixteenth century. But it is necessary to make a passing reference to another circumstance which has sometimes been referred to, as having an important bearing on the matter; it has been asserted by more than one authority whose opinion is entitled to careful consideration that remoteness of limitation was effectually prevented in early times by a supposed rule that no future interest could be created

Supposed rule against possibility upon possibility.

[1] "Modern conveyancing as a whole, and the regular use of settlements in their modern form, certainly date from about Bridgman's time. A brief but clear and admirably written account of the elements of the subject, both doctrinal and historical, is given in the part of Blackstone's Commentaries already referred to (Book II, Chap. II); it ought to be needless to mention this, but the text of Blackstone is nowadays unduly neglected, partly by reason of exaggerated criticisms which have obtained currency, partly from the ravages it has suffered at the hands of so-called editors." Pollock, Land Laws, 225.

[2] 1535, 27 Hen. VIII, c. 10.

[3] 1540, 32 Hen. VIII, c. 1.

[4] Williams, Real Property, 13th ed., 265-266.

[5] 1 Jurid. Soc. Pap., 47.

in favour of an unborn child of an unborn person as such a limitation involved a possibility upon a possibility. It is not necessary for our present purpose to enter into a minute examination of the cases in which this doctrine is said to have been applied or implied; but, there appears to be good ground for the conclusion to which Professor Gray [1] has been led by an elaborate examination of all the cases on the point that the notion that there cannot be a possibility on a possibility, first started by Chief Justice Popham, and vaguely repeated in practically identical language in several cases,[2] is not countenanced by the earlier authorities, at any rate, never took root, was disavowed by Lord Coke,[3] and finally discredited in the great case of the Duke of Norfolk,[4] in which Lord Chancellor Nottingham laid down in the clearest possible language that there was nothing unnatural or absurd in a possibility upon a possibility and a contingency upon a contingency.

Perpetuity, what.

Before we proceed to an examination of the cases in which the rule against perpetuites was first established, it would be desirable to have a clear notion of what is meant by a "perpetuity," and thus to guard ourselves against that ambiguity of terms which, since the days of Socrates, has been universally recognized as a fruitful source of error and confusion in every department of

[1] Perpetuities, §§ 126–131.

[2] "A lease could not commence upon a contingent which depended upon another contingent." *Rector of Chedington's case* (1598), 1 Co., 153*a* (156*b*). "A possibility which shall make a remainder good, ought to be a common possibility and *potentia propinqua*." *Cholomley's case* (1597), 2 Co., 50*a* (51*b*). "A possibility cannot increase upon a possibility." *Stafford's case* (1610), 8 Co., 73*b* (75*a*). "Sometimes one possibility shall not beget another." *Blamford* v. *Blamford* (1616), 3 Bulst, 98 (108). "The law will never intend a possibility upon a possibility." Co. Lit., 184*a*.

[3] 3 Bulst, 98 (108); 1 Rolle, 318 (321).

[4] (1681) 3 Ch. Cas., 29 "That there may be a possibility upon a possibility and that there may be a contingency upon a contingency is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's case*, looks like a reason of art, but in truth has no kind of reason in it, and I have known that rule often denied in Westminster Hall."

human knowledge. I do not purpose, indeed, to enter here into a discussion of the propriety or otherwise of the definitions given by various jurists—a discussion which will find its proper place in a later lecture, when we come to treat of the scope and corollaries of the rule against perpetuities. But I desire to point out to you at the earliest possible opportunity that the term "perpetuity" has been used in one or other of two senses which must be carefully distinguished. The natural, the original meaning of a "perpetuity" is "an inalienable, an indestructible interest," and this is the sense in which we find the word used whenever we come across it in the earliest reported cases; there is no attempt at an accurate definition, but we have various vague descriptions of it, as "an estate inalienable though all mankind join in the conveyance,"[1] an estate "where, if all that have interest join, yet they cannot bar or pass it,"[2] and as "a thing odious in law and destructive to the commonwealth, which would stop the commerce and prevent the circulation of the property of the kingdom."[3] But, this is not the sense in which the word is used in modern English Law; it has there a derivative, secondary, or artificial sense, namely, it denotes "an interest which will not vest till a remote period;" from this point of view, then, what is now called the rule against perpetuities should properly be called the rule against remoteness, inasmuch as it restrains the creation, not of interests which are inalienable and indestructible, but rather of future interests, which are intended to vest absolutely beyond certain specified limits of time. Thus, a condition not to suffer a recovery of an estate tail was declared by lawyers of the sixteenth century, to be bad, as tending to create a perpetuity, the word being manifestly used in its primary sense. To take another illustration, consider the famous case of

Original sense.

Modern sense.

Rule against remoteness.

[1] *Scattergood* v. *Edge* (1697), 1 Ch. Ca., 213. 1 Salk., 229.

[2] (1683) 1 Vernon, 164.

[3] *Washburn* v. *Downs* (1672),

Chudleigh's Case.

Dillon v. *Freine*, known as *Chudleigh's Case*,[1] which was heard in the Exchequer Chamber before all the judges in 1595. The facts of the case, so far as they are necessary for our present purpose, were that there had been a feoffment to the use of *C* for life, remainder to the use of *C's* unborn children in tail; before *C* had any children born, the feoffees conveyed to *C* in fee; question was then raised whether this feoffment had the effect of destroying the contingent remainders to the children of *C*, limited by way of use; the judges held that the remainders were destroyed. But it is to be noted that no suggestion is made that the use was bad for remoteness and consequently inoperative. To avoid the objection of perpetuity (in its primary sense), the Court held all future uses destructible, whereas, the modern rule, to avoid the objection of perpetuity (in its secondary sense), lays down that future interests beyond a certain period are invalid. In other words, in Chudleigh's Case, future uses were held valid but destructible; in modern law, they are held invalid beyond certain limits, but within those limits, indestructible.

First stage in the history.

(i) Cases of freeholds.

I have already mentioned to you that the cases decided during the sixteenth and the early years of the seventeenth century, while they contain a series of vague denunciations from the Bench against perpetuities, at the same time show that no attempt was made to lay down the precise limits within which future interests could be validly created. The earliest case, which can be usefully cited, is the case of *Matthew Manning*,[2] in which an executory bequest of a term after a life in being, was supported by Lord Coke on the ground that an executory devise after a life in being was good.[3] The principle of this decision was, shortly after, affirmed in *Lampet's Case*,[4] which appears to be the first case in which a perpetuity

Manning's Case.

Lampet's Case.

[1] (1595) 1 Co., 120 *a*. Tudor L. C., 200 (1st ed.).

[2] (1609) 8 Co., 94*b*.

[3] The utmost limit then allowed appears to have been a life in being.

[4] (1612) 10 Co., 46*b*.

in its original sense of an inalienable interest is mentioned in connection with an executory devise.[1] Eminent judges have made no secret of their dissatisfaction with both these decisions, but they have never been overruled.[2] The case of *Child* v. *Baylie*,[3] which was decided immediately after Lord Coke's time, is, indeed, an authority the other way, and, although the judges endeavoured to distinguish it from the cases of *Manning*[4] and *Lampet*,[5] it must be confessed that the cases were not in reality distinguishable. In that case, there was a devise of a term to *X* and his assigns, with a proviso that, if *X* died without issue living at his death, the term should go to *Y*; *X* assigned the term and died without issue. In an action in ejectment by *Y* against the assignee, the question could neatly be raised, whether the reason for the invalidity of a gift of a term, after a general failure of issue, lay in its remoteness; for, if remoteness was the reason, the gift to *Y* was good, as it must take effect on the death of *X* and was, consequently, not more remote than the gift which had been held good in *Manning's Case*.[4] In the Court of King's Bench, it was overlooked, however, both by counsel and the learned judges, that the gift over was to take effect in case *X* died without issue living at his death, and not in case of failure of issue

Doubted.

Child v. *Baylie*.

[1] Lord Coke, C. J.: "It would be inconvenient that such manner of perpetuity should be made of a chattel, when of an inheritance neither by act executed by the common law, nor by limitation of an use, nor by devises in last wills, any perpetuity can be established" (52*a*).

[2] "The first grant or devise of a term made to one for life, remainder to another, have been much controverted, whether such a remainder might be good, and whether all may not be destroyed by the alienation of the first party; and, if it were now first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it." *Child* v. *Baylie*, Cro. Jac., 459 (461). "Though we do not hold it fit to call in question the judgment in Matthew Manning's case, yet do not think it safe to stretch the law against the ordinary rules of law further than in that case it is done." *Pearse* v. *Reeve*, (1661), Pollexf., 29 (30).

[3] (1618—1623) Cro. Jac., 459; Palm 48, 333; W. Jones, 15.

[4] (1609) 8 Co., 94*b*.

[5] (1612) 10 Co., 46*b*.

generally. The Court held the gift bad, and one of the reasons assigned was that, if the gift was good, it could not be barred by *X*, and, "if the law did not suffer such perpetuities of inheritances, much less would it suffer perpetuities of chattels." The case was carried to the Exchequer Chamber in 1623, and, there for the first time attention was called to the nature of the event upon which the gift over was to take effect. But the Court held that the gift was bad, and that mischief would ensue if such a "perpetuity" were allowable; the Court also pointed out that there was no distinction, from this point of view, between a case of a devise to *X* and his assigns and upon his death without issue then living, to *Y*, and a case of a devise to *X* and the heirs of his body and upon his death without issue, to *Y*. It is manifest that the learned Judges could not have used the term in its modern sense of remoteness, for clearly upon the question of remoteness, there is a well-founded distinction between the two devises. The case is, therefore, instructive as showing that none of the twelve Judges, except Chief Baron Tanfield and possibly also Baron Denham, recognised that the validity of the limitation might in any way be affected by its remoteness. And, this is all the more curious when we remember that Davenport (afterwards Chief Baron of the Exchequer) who had argued before the Exchequer Chamber in support of the validity of the gift over, had enunciated in forcible, though somewhat quaint language, the principle upon which the whole foundation of the modern rule against perpetuities rests.[1] We have now seen how the first

First suggestion of remoteness from the bar.

[1] "There is no danger of perpetuity by such a conveyance. For he took a diversity when the contingency is such as can or ought to happen in the life of the devisee. There a remainder limited on such an estate in case of a devise of a chattel is good, as in our case, if he should die without issue of his body living at the time of his death, so that it does not exceed his life. But if the contingency be such as is foreign, is to commence *in futuro* after the death of the first devisee, there, because such limitation tends to make a perpetuity, a remainder limited on it is bad, as, if he should die without issue or without heir, that then it shall remain over. And on this diversity they strongly rely." Palm., 334.

suggestion of the rule against perpetuities came from the bar ; we have next to see how slow was the judicial recognition of remoteness as the essential element in judging the validity of future limitations.

The next decision to which I shall draw your attention is the case of *Pells* v. *Brown*,[1] the importance of which has been very variously estimated ; Lord Kenyon described it as "the foundation and as it were the Magna Charta of this branch of the law,"[2] and, Hargreaves, on the other hand, though he admits the almost unreachable subtlety of the reasoning, thought it could not "have furnished much of the code of executory devise."[3] In this case, land was devised to *A* in fee, and if he died without issue leaving *B* surviving him, then to *B* in fee. The event which happened was that *A* suffered a common recovery, devised the land to *C*, and died without issue. Upon a claim by *B*, the survivor, against the devisee, it was held that the executory limitation to *B* was good and could not be barred on the part of *A*. All that was actually decided, therefore, was the legality and efficacy of an executory devise on a contingency not exceeding one life in being. *Pells* v. *Brown*.

In *Snow* v. *Cutler*,[4] *A* having the reversion of copyhold land after the death of his wife, devised it to the heirs of her body if they should attain the age of fourteen—a devise which, if held valid, might have extended to a life in being and fourteen years later. *A* died without leaving issue by his wife ; she married again, and had a son who reached fourteen ; she then died. The question was whether the son was entitled. The Judges appear to have been in great doubt, some of them objecting to the devise on the ground that it was to a person unborn, and, also on the ground of Lord Coke's metaphysical doctrine of a double possibility, namely, the birth of a child and *Snow* v. *Cutler*.

[1] (1621), Cro. Jac., 590.

[2] *Porter* v. *Bradley* (1789), 3 T. R., 143 ; 1 R. R., 675.

[3] 2 Hargreaves, Jur. Arg., 30.

[4] (1660–1670) 1 Lev., 135 ; T. Raym, 162 ; 1 Keb., 752, 800 ; 2 Keb., 11, 145, 295 ; 1 Sid., 153.

that child's living to be fourteen years old. All the learned Judges appear, however, to have been agreed that an executory devise to take effect within the compass of a life was good, "but not after death without issue, for that would make a perpetuity." This seems to be the earliest direct statement of the proposition that the validity of an executory devise depends upon the question whether the event upon which it takes effect must happen within a lifetime.

First fixes a lifetime as limit.

(ii) Cases of chattels real.

We have now dealt with cases in which the validity of executory devises of freeholds came in question; we shall next briefly refer to some cases of chattels real, to the consideration of which the rule against perpetuities mainly owed its growth. It appears that two classes of executory devises of terms came before the Courts, namely, (i) those that were to take effect after a failure of issue, and (ii) those that were to take effect after a life interest. In the former class of cases, where the failure of issue was indefinite, the executory devises were held to be bad, in the latter class, they were held to be good. Thus, in *Goring* v. *Bickerstaffe*,[1] it was decided that in the case of a chattel, the limitation of a term to several persons in remainder, one after another, if those persons were in being and particularly named, could not tend to a perpetuity; in other words, as all the lives wear out together, the limitations really amount to the life of a person in being, with an ingenious machinery added to secure a long life. In *Love* v. *Wyndham*[2] it was held that if a tenant of a term devised it to *B* for life, remainder to *C* for life, remainder to *D* for life, the devise was good, if

Goring v. *Bickerstaffe.*

Love v. *Wyndham.*

[1] (1662) Freeman Ch., 163; 1 Ch. Cas., 4; Pollexf., 31.

[2] (1670) 1 Mod., 50; 2 Keb., 637; 1 Sid., 450; 1 Lev., 290.; 1 Ventr., 79; 2 Ch. Rep., 14. "If a term be devised to one for life, remainder to another for life, remainder to a third for life, and so to twenty, one after the other, it is a good devise to them all, notwithstanding the objection of possibilities upon possibilities, if all the persons were *in esse* at the time of the devise, because all the candles are lighted at once. But if the devise be to one for life, who is not then *in esse* (as to the first son), there no limitation of a term can be after that." 1 Sid., 451.

the remaindermen were all alive at the time of the devise. Similarly, in *Burges* v. *Burges*,[1] where a term was settled in trust for *A* for life, then for his wife for life, then for their first and other sons successively and the heirs of their bodies, and then for their daughters, Lord Keeper Finch held that the limitation to the daughters was void, but that to the first son was good, although that son was not *in esse* at the time of the decease of *A*. The inference, therefore, seems to be well-founded,—so far, indeed, as any inference may safely be drawn from cases which are not always intelligibly reported nor easy to reconcile—that up to the point of time we have now reached, the law was that any number of life interests could be given in succession to persons in being, that limitations to unborn persons might be good, but that the validity of an interest conditioned upon a contingency, was dependent as well upon its nature as upon its remoteness in time.

Burges v. *Burges*.

Conclusion: both nature and remoteness of contingency considered.

We shall now turn our attention to the great case of the Duke of Norfolk, sometimes called the Case of Perpetuities, which contains the first reasoned discussion of the Rule, and which finally established the doctrine that the validity of a contingent interest depends upon its distance in time and not upon the character of the contingency. The Duke of Norfolk's case was shortly this[2]: Land was conveyed by the Earl of Arundel to trustees for a term of 200 years, in trust for Henry his second son and the heirs male of his body, but if Thomas, the Earl's eldest

(iii) Close of first stage. *Duke of Norfolk's Case.*

[1] (1662), 1 Ch. Cas., 229; 1 Mod., 115; Pollexf., 40; Finch, 91.

[2] (1681), 3 Ch. Cas., 1; 2 Ch. Rep., 229. I have not thought it necessary to reproduce in detail all the terms of the somewhat complicated deed in this case; the object was to secure the profits of certain lands to the second son of the Duke of Norfolk, whoever he might be; the eldest son was a lunatic; hence the elaborate machinery employed in the deed. The deed was drawn by Sir Orlando Bridgeman, one of the greatest conveyancers of the seventeenth century, and, sometime a Judge in the Court of Common Pleas; it was of him that Lord Nottingham said: "It is due to the memory of so great a man, whenever we speak of him, to mention him with great reverence and veneration, for his learning and integrity." 3 Ch. Cas., 27.

son, should die without issue male in the lifetime of Henry, or if the earldom should descend upon Henry, then the trust to be for Charles, the third son. Thomas, the eldest son, died without issue in the lifetime of Henry; the question, then, arose whether the executory devise to Charles, the third son, was good, or whether, being limited after the trust to Henry and his heirs male, was not too remote. Lord Chancellor Nottingham was assisted by Lord Chief Justice Pemberton, Lord Chief Justice North, and Lord Chief Baron Montague; the Chief Justices of the three Common Law Courts were unanimous that the executory devise to Charles was void as tending to a perpetuity; the Lord Chancellor took a contrary view, holding that there could be a good limitation over, after a limitation of a term to *A* and the heirs of his body, provided the contingency on which the limitation over was to take effect must happen within a life in being. After defining the nature of a perpetuity,[1] the Lord Chancellor went on to point out that if the future estate must vest within a lifetime, it was wholly immaterial how it was dealt with before it vested; hence, as admittedly, a contigent limitation of a term to take effect within or at the end of the life of a person to whom a life interest was limited in the term, was good, all that it was essential to ascertain was that the contingency could not happen after his death, and it

[1] "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate: such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and the policy of the law and therefore not to be endured.

But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration; but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again." 3 Ch. Cas., 1 (31).

was immaterial whether the first taker was declared to hold to himself and the heirs of his body or in any other way. It would be impossible within the limits of this lecture to give you a detailed account of the arguments[1] advanced on both sides which are minutely examined in the judgment of the Lord Chancellor ; but, there is one argument advanced against the validity of the devise, which cannot be passed over in silence. Lord Nottingham was pressed to define the precise limits of time within which the contingency must happen ; it was said, "you may limit upon a contingency to happen in a life ; what if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster Hall stands ? Where will you stop if you do not stop here ?" The answer of the Lord Chancellor was characteristic : "I will tell you where I will stop ; I will stop wherever any visible inconvenience doth appear ; for the just bounds of a fee simple upon a fee simple are not yet determined, but the first inconvenience that ariseth upon it, will regulate it ;" and, "whenever you stop at the limitation of a fee upon a fee, there will we stop in the limitation of a term of years."

This judgment of Lord Nottingham, one of the most remarkable ever delivered in the Court of Chancery, was after his death, reversed on review by Lord Keeper North in 1683 ; but on appeal to the House of Lords, the decree of the Lord Keeper was in 1685 reversed, and Lord Nottingham's decree affirmed. Ever since then it has been a settled point that a future interest might be limited to commence on any contingency which must occur within lives in being, and, that in this respect there was no valid distinction between terms of years and freehold

Result: contingency must occur within lives in being.

[1] On behalf of the plaintiff, the metaphysical doctrine of the invalidity of a possibility on a possibility was invoked, but found no favour, the Lord Chancellor observing : "There may be a possibility upon a possibility, and a contingency upon a contingency, and in truth every executory devise is so, and, therefore, the contrary rule given by Lord Popham in the Rector of Chedington's case, is not reason."

interests. The case of the Duke of Norfolk thus marks the close of the first stage in the history of the Rule against Perpetuities. We shall now proceed to examine the subsequent history, and trace how, to use Lord Nottingham's phrase, the just bounds of the rule were determined.

Second stage in the history. *Lloyd* v. *Carew*.

In *Lloyd* v. *Carew*[1] there was a devise to the heirs of the body of husband and wife, but if they died without such heirs, then, if the wife's heir should within a year of the death of the survivor of them pay to the husband's heir £4,000, the land was to go to the wife's heir in fee. You will see that this was, in substance, a settlement on two lives in being and a year beyond; it was held bad, apparently on the ground of remoteness, by the Court of Common Pleas, but the decree was reversed upon appeal by the House of Lords. This case, therefore, is conclusive authority for the proposition that a future interest, to take effect twelve months after lives in being, is good. In some of the earlier cases, however, learned judges had certainly recognized the validity of executory devises which were not to take effect immediately upon the termination of lives in being, while in others, again, a strong opinion had been expressed that the limit ought to be fixed at the termination of lives *in esse*.

Snow v. *Cutler*.

Thus in *Snow* v. *Cutler*,[2] to which I have already referred you, there had been a devise to the heir or heirs of the body of the testator's wife, if he or they should attain fourteen years. Some of the learned judges were certainly prepared to support this devise, which, if good, might have extended to a life in being and fourteen years beyond. The Court, however, were equally divided, and, the reporter adds, "I suppose the parties afterwards agreed, for I heard nothing of it after."

Taylor v. *Biddal*.

In *Taylor* v. *Biddal*,[3] *A* devised land to his sister *B*, the wife of *C*, until *D*, the son of *B* and *C*, should reach

[1] (1697) Pre. Ch., 72, 106; Shower, 137.

[2] 1 Lev., 135.

[3] (1672) 2 Mod., 289; Freem., K. B., 243.

twenty-one, and, then to *D* and his heirs ; but if *D* should die under twenty-one, then to the heirs of the body of *C* and to their heirs, as they should attain their respective ages of twenty-one years. *D* died under twenty-one, then *B* died, leaving a daughter *E ;* then *C* died, leaving *E* of full age. In ejectment brought by the plaintiff who claimed as lessee under the heir of *A*, *E* claimed either as the heir of the body of *C*, or, if the devise to such heir was void, then as heir of her brother *D*. The Court held that *E* was entitled not only as the heir of *D* (whose estate was vested), but also under the executory devise over to her.[1] This certainly seems to recognize the validity of a devise to lives in being and twenty-one years afterwards. The case, however, hardly seems to have been treated as an authority for that proposition ; and, the reason is not far to seek ; for, though the form of devise "to *X* for life until *Y* reaches twenty-one," might where *Y* was then unborn, really cover a case of a life in being and twenty-one years after, yet in the case in which *Y* was born and *X* was alive at his majority,[2] the devise would be within the life of *X*, a person in being, and, thus the possible extension might be overlooked. Thus in *Luddington* v. *Kime*,[3] while one of the learned judges was prepared to allow a posthumous son to take, "as happening so short a time after the death of a life in being," Chief Justice Treby "doubted much of that and was of opinion that the time allowed for executory devises to take effect, ought not to be longer than the life of one person then *in esse*." Similarly, in *Scattergood* v. *Edge*,[4] it was still considered doubtful whether a life or lives in being was not the extreme limit, and Chief Justice Treby, while allowing

Luddington v. *Kime.*

Scattergood v. *Edge.*

[1] Upon this point, the Reports are not agreed; but the statement in the text is made on the authority of *Stephens* v. *Stephens* (1736) (Cas. Temp. Talbot, 228, 232), where Lord Hardwicke caused the record to be searched and the real decision ascertained. See the passage quoted, p. 36, *post*.

[2] This was the contingency which actually happened in this case.

[3] 1696, 1 Ld. Raym., 203.

[4] 12 Mod., 278, 287; (1699) 1 Salk., 229.

the validity of a devise to the eldest son of *A* (who had then no son) and his heirs male, and, if *A* should die without issue then to the eldest son of *B* (who had then issue) in tail, expressed in very emphatic language the strong dislike of the Common Law Judges to any extension of the limits of executory devises. He said: "Since they have crept into the law, they have occasioned great confusion and disorder; they were utterly unknown to the Common Law, have obtained with much ado, and now they have prevailed, ought to be looked upon with much jealousy, lest they run to a perpetuity; and, a perpetuity is such a condition of a fee that the feoffee shall not be able absolutely to give to another. It was a great policy of the Common Law that alienation should be encouraged; for it is the greatest preserver and promoter of industry, trade, arms and study; and this was visible from the making of the Statute De Donis, until common recoveries were found out; and these executory devises had not been long countenanced when the Judges repented them, and, if it were to be done again, it would never prevail; and, therefore, there are bounds set to them, namely, a life or lives in being; and further, they shall never go by my consent, let Chancery do as they please." Matters continued in this state of uncertainty[1] till the decision of *Stephens* v. *Stephens*,[2] in which it

Stephens v. *Stephens.*

[1] For instance, in *Massingberd* v. *Ash* (1685), 2 Ch. Rep., 275, the validity appears to have been admitted of a limitation of an estate to begin within twenty-one years after a life in being; and the same view was taken in *Maddox* v. *Staines* (1727), 2 P. Wms., 421; and *Stanley* v. *Leigh* (1732) 2 P. Wms., 686. The contrary view prevailed with the Court of Common Bench in *Gore* v. *Gore* (1722), 2 P. Wms., 28; 2 Str., 958.

[2] 1736, Cas. temp. Talbot, 228, Lord Hardwicke and the other Judges in certifying to the Court of Chancery, said: "We do not find any case wherein an executory devise, of a freehold hath been held good, which hath suspended the vesting of the estate until a son unborn should attain his age of twenty-one years, except the case of *Taylor* v. *Biddal*, adjudged upon a special verdict as the Court of Common Pleas, and reported in 2 Mod., 289. That resolution appeared in every view of it to be so considerable in the present case, that we caused this record to be searched, and find it to agree in the material parts

was definitively settled that a future interest is not too remote if it depends upon a contingency which must happen before some person born or begotten during a life in being reaches twenty-one. Here it should be added that simultaneously with the growth of this rule, was also established the rule which allows the addition of the period of gestation in cases where gestation actually exists; properly speaking, indeed, this is not an independent rule, but only a special application of the general principle that an unborn child is treated as in actual existence, whenever it is for his benefit so to treat him.[1] Thus, in *Luddington* v. *Kime*,[2] Powell, J., held that an executory devise to *A*, and, if he should have a posthumous son born, to such son, was valid. In *Gore* v. *Gore*,[3] similarly, Lord Hardwicke, then Chief Justice, and the other judges affirmed the validity of a devise which was to take effect upon the birth of a posthumous

21 years rule

Gestation.

Luddington v. *Kime.*

Gore v. *Gore.*

thereof with the printed report: and, therefore, however unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors, yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, namely, during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity; and, that this construction will make the testator's whole disposition take effect, which otherwise would be defeated; we are of opinion, that the devise before mentioned may be good by way of executory devise" (p. 232).

Lord Chancellor Talbot decreed in accordance with this opinion, and expressed his satisfaction with it, as agreeing perfectly with his own sentiments, and said, he hoped it would be for the futu a leading case in the determination of all questions of this kind.

[1] See Stat. 10 and 11, Will. III, C. 16 (1699), which provided that children *en ventre sa mere* at their father's death, should for all purposes of limitations of estates, be deemed to have been born in his lifetime. This rule has sometimes been treated as merely explanatory of the phrase "lives in being," the period of gestation being regarded, not as a new period, but as an appendix of the life in being. Cf. *Long* v. *Blackall* (1797, 5 Taunt., 392, 4 R. R., 73), where the period of gestation was reckoned at the beginning of the period; in other words, an infant *en ventre sa mere* at the testator's death was reckoned as a life in being from whose death the twenty-one years would run. In some cases, therefore, as will be explained later on, the period of gestation may be counted twice.

[2] 1697, 1 Ld. Raym., 203.

[3] 1722, 2 P. Wms., 28.

son. The rule thus laid down in the case of the *Duke of Norfolk*[1] and *Stephens* v. *Stephens*[2] was henceforth treated as settled law, and Sir William Blackstone,[3] writing in 1765, says: "The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and, one and twenty years afterwards." Similarly, in *Jee* v. *Audley*,[4] Sir Lloyd Kenyon, Master of the Rolls, after stating that the rule as laid down above, has been sanctioned by the opinion of Judges of all times, from the time of the *Duke of Norfolk's Case* to the present, adds, "it is grown reverend by age and is not now to be broken in upon."

Sir W. Blackstone.

Jee v. *Audley*.

Third stage in the history.

One stage further in the history of the Rule against Perpetuities, and we shall have reached the developed form of the rule with which we are all familiar. You will remember that the rule as finally laid down in *Stephens* v. *Stephens*[2] is that a future interest is not too remote if it depends upon a contingency which must happen before some person born or begotten during a life in being reaches twenty-one. The conjecture may safely be hazarded that some, at any rate, of the judges who decided the earlier cases upon which *Stephens* v. *Stephens*[5] was based, agreed to an extension of the period to twenty-one years after lives in being, upon the ground that the power of alienation will not thereby be restrained longer than the law does otherwise restrain it when the devise is in favour of a posthumous child, during whose minority alienation is necessarily restrained. Thus, for instance, in the certificate granted by Lord Hardwicke and the other judges in *Stephens* v. *Stephens* [5] it is stated that the judges very reluctantly agreed to an extension of executory devises beyond the rules generally laid down by their predecessors (that is, to an extension of twenty-one years beyond a life or lives in being) on the ground that "the

[1] 1681, 3 Ca. Ch., 1.
[2] 1736, Cas. Temp. Talbot, 228.
[3] 2 Commentaries, 174.
[4] (1787) 1 Cox., 324, 1 R. R., 46.
[5] (1736) Cas. Temp. Talbot, 228.

power of alienation will not be restrained longer than the law could restrain it, namely, during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity." Similarly, in *Doe* v. *Fonnereau*,[1] Lord Mansfield said: "In *Stephens* v. *Stephens* the Court took a large stride of twenty-one years after a life in being. The argument was that this would not create a perpetuity. Former cases had said, a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child, and alienation was not restrained for any longer time in *Stephens* v. *Stephens*, for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one." The question, however, whether in the case of executory devises this additional period of twenty-one years must relate to the actual minority of some particular person, or whether it was a term in gross, that is to say, a term of twenty-one years from the death of the last life in being, irrespective of the minority of any particular person, was treated as open for many years, and was finally settled only so late as 1833 by the House of Lords in the case of *Cadell* v. *Palmer*.[2] In that case land was devised to trustees for one hundred and twenty years from the testator's death, if twenty-eight persons named in the will or any one of them, should so long live, and, for a further term of twenty years from the expiration or earlier determination of the term of 120 years. Out of the term so created, a number of smaller estates was carved out, some of which, as, for instance, an estate to the son of an unborn person for a term of ninety-nine years if he should so long live, would, if standing by themselves and limited out of the fee, have been indubitably invalid. It is quite clear that the testator besides employing an ingenious machinery for

Cadell v. *Palmer*, 21 years period may be a term in gross.

[1] (1780) 2 Doug., 487 (508).

[2] (1833) 1 Cl. & F., 372; Tudor, L. C., 424. See the report of this case in the Court below, under the title of *Bengough* v. *Edridge*, (1826-7) 1 Sim., 173; 5 L. J. Ch. (O. S.), 113.

securing the longest "life in being" by taking the survivor of 28 persons as the "life in being," also treated the additional period of twenty-one years as a term in gross, independent of the minority of the particular persons interested in the estate. The case was most elaborately argued, in the first instance, before Sir John Leach, Vice-Chancellor, by Preston in support of the will, and by Sugden against the validity of the limitations. The Vice-Chancellor held in 1826 that the limitations were valid, and that the term of twenty-one years could be taken without reference to the minority of any one. Upon appeal to the House of Lords, the judges were summoned in 1832; eleven of them who attended, declared that the term of twenty-one years was independent of the minority of any person; and in accordance with this opinion, the decree of the Vice-Chancellor was affirmed. It would be impossible for me, within the limits of this lecture, to reproduce to you all the arguments advanced on each side, nor is it absolutely necessary that I should do so, as they are well within your reach in the excellent volume of Leading Cases on Real Property by Mr. Tudor. But I may just mention to you that the argument in support of the will was mainly directed to show that in all the numerous cases on the subject, the distinction had nowhere been taken that the suspension of the vesting of an estate could not be carried beyond the period of lives in being except with reference to the minority of the individual who was to take. On the other hand, the argument against the validity of the limitations was principally directed to establish that although there might be isolated expressions in the reports, which, taken apart from the facts of the individual cases, possibly lent some support to the view that the period of twenty-one years was a term in gross, yet such an interpretation was entirely at variance with the whole spirit and policy of the English law; that, indeed, such a conclusion was contrary to the whole history of the doctrine, which abundantly showed that in the early stages of the rule, a gift was

Tudor, *L. C.*, p. 578.

valid if it was to take effect after a life or lives in being, that subsequently the rule was extended so as to validate gifts to an infant in *ventre sa mere* at the time of the termination of the life or lives in being, that later on, the rule was still further widened, so as to cover cases in which the vesting was postponed till the beneficiary attained twenty-one, and that this last extension was sanctioned on the ground that it did not practically render property inalienable for a longer period than it would otherwise be, inasmuch as an infant could not convey during his minority. There is not much room for doubt that the decision of the House of Lords, which necessarily closed all controversy on the point so far as the English Courts were concerned, gave the rule an extension which it would be very difficult to justify on principle, and, it is gratifying to find that in this instance at least, the sages of the Indian legislature have not blindly copied the provisions of the English law. It must, however, be confessed that, having regard to the state of the authorities at the time the case of *Cadell* v. *Palmer* came before the Courts, the decision of the House of Lords, however lamentably opposed to principle it might be, could hardly be otherwise than what it was, in spite of the desperate efforts of Sugden to induce the Courts to accept the view which he had already advanced in a learned note to his edition of Gilbert on Uses.[1] I shall, therefore, briefly refer to some of the earlier cases which have an important bearing on the point. In *Lloyd* v. *Carew*,[2] you will remember there was a conveyance to *A* and his wife for life, remainder to his children successively in tail, remainder to *A* in fee, provided that, if at the death of the survivor of *A* and his wife, there should be no issue of theirs then living, and, if the heirs of the wife should, within twelve

Doubtful on principle. Not followed in India.

The House of Lords bound by an earlier case.

Lloyd v. *Carew*.

[1] 1811, p. 260, note. "Between these two certificates, the point was most ably discussed by a very learned and able writer, who was against the validity of an absolute term of twenty-one years." Sir Edward Sugden, *arguendo*, 1 Cl. and F., 395.

[2] (1697) Pre. Ch., 72, 106; Shower, P. C., 137.

months after such death without issue, pay £4,000 to the heirs of *A*, then the estate should go to the heirs of the wife for ever. *A* and his wife both died without issue, living at the death of the survivor ; the heir of the wife having tendered £4,000, question was raised as to the validity of the devise to such heir. In support of the executory devise it was argued that[1] "it was within the reason of the contingent limitations allowed by Nottingham, L.C., in the *Duke of Norfolk's Case;* that though there can be no remainders limited after a fee-simple, yet there may be a contingent fee-simple arise out of the first fee ; that the utmost limitation of a fee upon a fee is not yet plainly determined ; that there could not in reason be any difference between a contingency to happen during life or lives, or within one year afterwards ; that the true reason of such opinions which allowed them, if happening within the time of the parties' lives, or upon their decease, was because no inconvenience could be apprehended thereby, and the same reason will hold to one year afterwards ; and, the true rule is to fix limits and boundaries to such limitations, when so made, as that they prove inconvenient, and not otherwise." On the other hand, it was urged against the validity of the devise that the life of one or more persons in being, was the "furthest that the Judges have ever yet gone in allowing these contingent limitations upon a fee ; and if they should be extended, and allowed to be good upon contingencies to happen within twelve months after the death of one or more persons, they may as well be allowed upon contingencies to happen within a thousand years, by which all the mischiefs, that are the necessary consequences of perpetuities, which have been so industriously avoided in all ages, will be let in ; and the owner of a fee-simple thus clogged would be no more capable of providing for the necessities and accidents of his family, than a bare tenant for life." Sir John Somers (Lord

[1] Shower, P. C., 139, 140.

Chancellor), assisted by Treby, C. J., and Rokeby, J., decided against the validity of the devise; but this decree was reversed, on appeal, by the House of Lords. There can be little doubt that this decision does not make the additional period dependent upon the minority of any person and really settled the rule. Having regard therefore to the principle that a decision of the House of Lords, is an authoritative and conclusive declaration of the existing state of the law, binding upon itself when sitting judicially, as much as upon all inferior Courts, and that the doctrine upon which the judgment is founded must be universally taken for law, till altered by Act of Parliament,[1] the decision in *Cadell* v. *Palmer* could hardly have been otherwise than what it was, unless indeed the earlier decision was subjected to the operation of being "interpreted and limited in application."[2]

Marks v. *Marks*.

In *Marks* v. *Marks*,[3] question was raised as to the validity of an executory devise to take effect on the payment of a sum of money within three months after the death of a person living at the death of the testator. Lord Chancellor Parker, assisted by Sir Joseph Jekyll, M. R., decided in favour of the devise, the Master of the Rolls observing that "though before the case of *Lloyd* v. *Carew*, it seems to have obtained for law that no executory devise of a fee upon a fee should be allowed of, unless upon a contingency to happen during the life of one or more persons in being at the time of the settlement, yet, since that case, the law is now settled, that in case of a contingency that cannot in the nature of it precede the death of a person, a reasonable time may be allowed subsequent to the decease of that person for

[1] See *Attorney-General* v. *Dean and Canons of Windsor* (1860), 8 H. L. C., 369 (391); 30 L. J. Ch., 529 (531), *per* Lord Campbell, L.C.; *Beamish* v. *Beamish* (1861), 9 H. L. C., 274 (338-9), *per* Lord Campbell, L. C.; see also *Tommey* v. *White* (1850), 3 H. L. C., 49 (69), *per* Lord Truro, L. C.; *Exp. White* v. *Tommey* (1853), 4 H. L. C., 313 (333-4), *per* Lord Cranworth, L. C.

[2] See *Caledonian Railway* v. *Walker*; (1882), 7 App. Cas., 259 (275), *per* Lord Selborne, L.C.

[3] (1718), 10 Mod., 419; 1 Str., 129; Prec. Ch., 486.

performance of the condition, and a fee limited thereupon is good."

Older cases to the contrary.

It is not necessary to refer here in detail to the class of old cases in which the Courts say that "the time in which an executory devise is to arise is not yet precisely settled";[1] nor would it serve any useful purpose to examine in detail the other class of cases in which though the rule is laid down broadly[2] that "by an executory devise an estate may be locked up for a life or lives in being and twenty-one years after," yet the circumstances of the cases show that the Courts were considering executory gifts arising during a minority; indeed, in many of these cases, the expressions used by the learned judges themselves show that they were thinking of minorities, and that their attention was not drawn to the distinction between a minority and a term in gross.[3] I shall, therefore, pass on at once to a case in which Lord Alvanley, M. R., expressed the opinion that the additional period of twenty-one years was not a term in gross. In *Thellusson* v. *Woodford*,[4] that learned judge said: "The period of twenty-one years has never been considered as a term that may at all events be added to such executory devise or trust. I have only found this dictum that estates may be inalienable for lives in being and twenty-one years, merely

Thellusson v. *Woodford.*

[1] See, for instance, *Scattergood* v. *Edge* (1699), 1 Salk., 229; *Gore* v. *Gore* (1734), 2 Str., 958; *Stanley* v. *Leigh* (1732), 2 P. Wms., 686 (688).

[2] See *Fisher* v. *Prince* (1763), 3 Burr., 1363 (1364), where Lord Mansfield says: "The reason and spirit of cases make law, not the letter of particular precedents."

[3] See, for instance, *Goodtitle* v. *Wood* (1740), Willes, 211 (213); *Marlborough* v. *Godolphin* (1759), Eden, 404 (418); *Goodman* v. *Goodright* (1759), 2 Burr., 870, 1 W. Bl., 188, *per* Lord Mansfield; *Buckworth* v. *Thirkell* (1785), 3 B. and P., 652, note, *per* Lord Mansfield; *Jee* v. *Audley* (1787), 1 Cox., 324; 1 R. R., 46, *per* Sir Lloyd Kenyon, M. R.; *Long* v. *Blackall* (1797), 7 T. R. 100, 4 R. R., 73; *Thelluson* v. *Woodford* (1799), 4 Ves., 227 (319), where Buller, J., says: "The rule allowing any number of lives in being, a reasonable time for gestation, and twenty-one years, is now the clear law, that has been settled and followed for ages, and we cannot shake that rule without shaking the foundations of the law." If this is accurate, an 'age' must be defined to be less than a century.

[4] 4 Ves., 227 (337), 4 R. R., 205.

because a life may be an infant or *en ventre sa mere*."[1] Following this, came the case of *Beard* v. *Westcott*,[2] where there were devises over, after limitations which were too remote, and which depended on a contingency of the death under twenty-one of unborn persons who took no interest under the will. The validity of the devises was challenged on two grounds, first, that they were after remote limitations, and, secondly that the contingency had no reference to the minority of persons who took an interest under the will. Sir William Grant, then Master of the Rolls, sent the case to the Court of Common Pleas, who in 1810 certified in favour of the validity of the limitations.[3] The case was again sent back, and, in 1813, the Court of Common Pleas again certified that the case was not affected by the fact that "the gifts over might take effect at the end of an absolute term of twenty-one years after a life in being at the death of the testator without reference to the infancy of the person intended to take."[4] Lord Eldon was apparently not satisfied with these certificates, and was prevailed upon in 1822 to send the case to the King's Bench.

Beard v. *Westcott.*

[1] In the same case Lord Chief Baron Macdonald, delivering the opinion of the judges in the House of Lords, said: "The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." 11 Ves., 143, 1 B. and P., 393 (1805). But in an earlier passage (1 B. and P., 388; 11 Ves., 137), his Lordship had stated that the law was summed up by Lord Chief Justice Willes "with his usual accuracy and perspicuity" in *Goodtitle* v. *Wood*, 1740 (Willes, 213; 7 T. R., 103). "At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length, it was extended a little further, namely, to a child *en ventre sa mere* at the time of the father's death; and the rule has in many instances, been extended to 21 years after the death of a person in being, as in that case likewise, there is no danger of a perpetuity." (See also 8 R. R., 104, 110.)

[2] (1822) 5 Taunt., 393; 5 B. and Ald., 801; 24 R. R., 553.

[3] See this certificate set out in Gilbert on Uses (Ed., Sugden), p. 274, 275.

[4] 5 Taunt., 407, 408, 413.

[5] See *Monypenny* v. *Dering* (1852), 2 DeG. M. & G., 145 (182); 22 L. J. Ch., 313 (319), where Lord St. Leonards explains the history of the case and the ground of the judgment of the King's Bench.

That Court after hearing elaborate arguments by Sugden and Preston[1] on both the questions raised, sent a short certificate that the limitations over were bad. It is impossible to guess the precise grounds on which the certificate was based. Lord Eldon, in confirming the certificate, certainly adopted the view that the limitations had been pronounced void on the ground that they were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, and he added that the inclination of his opinion was that the Court of King's Bench was right.[2] Mr. Justice Bayley, on the other hand, who had signed the certificate, in delivering the opinion of the judges in *Cadell* v. *Palmer* eleven years later, stated that the subsequent limitations were considered void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation.[3] Lord

[1] 24 R. R., 556.

[2] *Beard* v. *Westcott*, Turn. & Russ., 25.

[3] 1 Cl. & F., 372 (420).

"The foundation of the certificate of the Court of King's Bench was that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas, had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but when it became totally immaterial, in the construction they were putting upon the will to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at that that point was not so fully considered as it might otherwise have been." It must not be overlooked, however, that the case sent to the Court of King's Bench in 1822 called particular attention to the fact that the period of twenty-one years did not correspond to the infancy of any person who took an interest under the will (5 B. & Ald., 805), and Lord Eldon not unnaturally inferred that it was "impossible that the Courts of King's Bench should not have considered that point." (Turn. & Russ., 25).

St. Leonards also, it seems, understood the groundwork of the decision in the same way.[1] On the whole, therefore, the result of the proceedings in *Beard* v. *Westcott* appears to be that on the one hand, we have the opinion of the Court of Common Pleas in 1813 involved in their certificate which was subsequently nullified, possibly on a different ground, and, on the other hand, we have the opinion of Sir William Grant and Lord Eldon who were both inclined to agree with the view expressed by Lord Alvanley in *Thellusson* v. *Woodford*. Having regard, therefore, to the inexpediency of deciding any case upon the authority of the dicta of modern judges,[2] the House of Lords could hardly be expected to fritter away the effect of the decision in *Lloyd* v. *Carew*.[3]

Recapitulation.

I have now traced in outline the history of the origin and development of the rule against perpetuities in English law. I have pointed out to you how, after much uncertain struggle for existence, the rule first assumed definite shape in the case of the Duke of Norfolk, by which it was settled beyond possibility of all controversy that an executory limitation which must necessarily vest (if at all) during the life or lives of a specified person or persons in being, is good. I have pointed out to you that although within sixteen years of this decision, the House of Lords in *Lloyd* v. *Carew* (1697) affirmed the validity of a devise which was to take effect twelve months after lives in being, it was considered doubtful for many years whether a life or lives in being were not the extreme limit, and it was not till the decision of *Stephens* v. *Stephens* (1736) that the validity of an executory devise to an unborn child of a living person when he should attain the age of twenty-one years, was conclusively established. I have further

[1] *Monypenny* v. *Dering* (1852), 2 DeG. M. & G., 145; 22 L. J. Ch., 313.

[2] See *Quilter* v. *Heatley* (1883), 23 Ch.D., 42 (49), *per* Jessel, M. R.; *Exp. Willey* (1883), 23 Ch. D., 118 (127); 52 L. J. Ch., 546 (548), *per* Jessel, M.R.; *Dashwood* v. *Magniac* (1891), 3 Ch., 306 (376); 60 L. J. Ch., 809 (826), *per* Kay, L. J.

[3] Shower, P. C., 137.

pointed out to you that, however desirable, however reasonable, it might be upon principle to establish some connection between the antecedent life-estates and the property, no such suggestion appears ever to have been judicially made, and, it was finally laid down by Lord Eldon in *Thelluson* v. *Woodford* (1805), that the number of antecedent lives might be unlimited and might be totally unconnected with any interests in the property, provided "they are all in being and wear out together, as candles lighted at once." Lastly, I have pointed out to you how in spite of the decision of the House of Lords in *Lloyd* v. *Carew* (1697) which established the validity of a limitation to take effect within a *reasonable time* after lives in being, the whole matter was really left open, as this decision neither defined the extent of this reasonable time nor even suggested that such time was in any way dependent upon the minority of any person; how the first of these questions was answered in *Stephens* v. *Stephens* (1736), and how the second was left open for many years till it was indisputably settled by the decision of the House of Lords in *Cadell* v. *Palmer* (1833), which laid down that the additional term was a term of twenty-one years in gross, limited simply as a space of time, irrespective of the infancy of any person interested in the property.[1]

[1] It has been pointed out by Mr. Scrutton that although the rule against perpetuities seems to have been built up on the analogy of the rule relating to contingent remainders, it yet goes further than its model in two important respects. In the first place, the rule as to remainders is that no estate can be limited after a life estate to a person unborn; and, in settlements by remainders, the "lives in being" all take life-estates in the land, and have a substantial interest in it, in other words, there is some reasonable connexion between the duration of their lives and the postponement of free alienation. But in executory devises, the lives in being may have no interest at all in the land; in *Cadell* v. *Palmer*, for instance, out of the twenty-eight lives in being, twenty-one had no interest in the land at all. In the second place, while a settlement by remainders in tail depending on particular life-estates can only last for twenty-one years after lives in being and may possibly cease to restrain alienation at the death of the last tenant for life, according to the age of the particular tenant-in-tail, an executory devise, founded as it is on a term in gross, ca

Having thus directed your attention to the great landmarks in the history of the doctrine under the English law, we must turn our attention to the history of the doctrine in India, where we have a very different story to tell.

always be contrived so as to restrict alienation for the full term of twenty-one years after lives in being, which it will be remembered may, by an ingenious device, be prolonged with all but certainty beyond the average duration of human life. These distinctions which operate to make the rule against perpetuities in the case of executory devises much less stringent than the corresponding rule with regard to remainders did not escape the Real Property Commissioners, who recommended, first, that lives in being employed to postpone the period of free alienation should not be arbitrarily taken and that all lives should be deemed to be arbitrarily taken unless in the instruments creating the limitations, each life appeared to be actually interested in the land; and, secondly, that a contingent remainder or other future estate or interest which, if limited to take effect out of an estate in fee, would be void under the rule against perpetuities, should also be void if limited to take effect out of any estate less than fee-simple, that is to say, limitations otherwise void cannot be rendered valid by the protection of a term of years. (Land in Fetters, 131.)

LECTURE III.

The Rule against Perpetuities—Its History in Indian Law.

Applicability of English law in India.

In the present lecture, I purpose to trace in outline the history of the Rule against Perpetuities in Indian law, by an examination of the provisions relating to that subject in the different systems of personal law which have prevailed here ; but, before I do so, it is desirable to draw your attention to the fact that the technicalities of the English law on the subject have no application in this country. It is not necessary for our present purposes to undertake an exhaustive enquiry into the interesting but somewhat intricate problem as to the extent to which English law has been received in India ; I only wish to remind you that the question is not without illustration from authority. Thus, for instance, in the celebrated case of *Mayor of Lyons* v. *East India Company*,[1] relating to the charitable bequests contained in the will of General Martin, the question was raised, whether the English law, incapacitating aliens from holding real property to their own use and transmitting it by descent or devise, had ever been introduced into India. Reliance was placed upon the decision of Lord Lyndhurst in *Freeman* v. *Fairlie*,[2] but Lord Brougham, in delivering the opinion of the Judicial Committee, held that that case only decided that the estate in land and tenements of a British subject in Calcutta was freehold of inheritance descendible according to the English Law of succession, and that, although this conclusion was reached by the adoption

Mayor of Lyons v. *East India Co.*

[1] (1836) 1 Moore I. A., 175.

[2] (1825) 1 Moore I. A., 305.

of the larger position that the English law had been introduced into the settlement, yet whatever went beyond holding that the land was freehold of inheritance was *obiter*, and could not be taken to have been decided. You will observe that, although the actual decision in the case is limited to the determination that certain specified rules of the English Law of Property were not applicable in India, the reasoning which pervades the decision[1] involves the conclusion that English law, as a system, has not been introduced into India, and, that before any definite portions can be held applicable, it must be shewn either that their operation had been extended by express legislation or that they are consonant to those principles of "justice, equity and good conscience,"[2] according to which our judges are supposed to act in cases where no statutory rules exist.

Advocate-General v. Surnomoyee.

Many years later the same question was raised in the well-known case of *Advocate-General of Bengal* v. *Surnomoyee Dossee*,[3] in which a claim was made on behalf of the Crown to a portion of the personal estate of Raja Kristonath Ray, on the ground of forfeiture by reason of his having committed suicide in Calcutta and found by inquisition to have been *felo de se*. The case was heard in the first instance in the Supreme Court at Calcutta, and Sir Barnes Peacock, in an elaborate judgment,[4]

[1] This case also decided that the Statute of Mortmain, which had its origin in a policy peculiarly adapted to the circumstances of England, does not apply to India. (1 Moore I. A., 296). This was followed by Lord Lyndhurst, L. C. in *Mitford* v. *Reynolds*, (1842, 1 Phillips, 185; 12 L. J., Ch., 40). See also *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R., 6 P. C., 381.

[2] See, for instance, the case of *Varden Seth Sam* v. *Luckpothy Royjee Lallah* (1862, 9 Moore I. A., 307); there the parties, some of whom were Hindus, some Mahomedans, one an Englishman, another an Armenian, had entered into a contract, which, it was contended, amounted to an equitable mortgage by deposit of title-deeds. Lord Kingsdown held that the parties not having contracted with reference to any particular law forbidding the creation of such a lien, the principles of English law might be applied as consonant to "justice, equity and good conscience."

[3] (1863) 9 Moore I. A., 391.

[4] (1861) 9 Moore I. A., pp. 396—410.

held that the English law of forfeiture of goods and chattels, in the case of *felo de se*, had never been extended to India. Upon appeal, the question was exhaustively argued before the Judicial Committee, and the "admirable judgment" of Sir Barnes Peacock was affirmed on the ground that "the English laws were not applicable to Hindoos on the first settlement of the country, and that the laws of the country remained unchanged, till they were altered by express enactment."[1]

Elementary principle.

But, so far as the matter in hand goes, we need not depend on any inferences and generalizations that may or may not be deducible from the cases to which I have drawn your attention. It may now be laid down, as an elementary principle, settled by the decisions of the highest Courts, that the nature and extent of testamentary power which may be exercised by a Hindu, are not, so far as relates to limitations in tail male or executory devises, regulated by any analogy to the law of England. In the case of *Ramkishore Acharj Chowdree* v. *Bhoobanmoyee Debea*,[2] which came before the Sudder Dewany Adawlut of Bengal in 1858, the Courts were called upon to construe a deed which has been described by some as a will and by others as a deed of permission to adopt.

[1] "Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community, become also partakers of and subject to the same laws. But this was not the nature of the first settlement made in India; it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country. It is true that they retained their own laws for their own government within the factories which they were permitted by the ruling powers of India to establish. But the permission to use their own laws by European settlers does not extend those laws to natives within the same limits, who remain, to all intents and purposes, subjects of their own sovereign. But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown, by express enactment, to alter the laws of the country, but until so altered the laws remained unchanged." *Per* Lord Kingsdown, 9 Moore I. A., pp. 428—430.

[2] Beng. S. D. A., 1859, p. 229.

One of the learned judges, in deciding upon the validity of the limitations contained in the deed, referred to and followed the principles laid down in Fearne on Contingent Remainders.[1] The case having been taken, on appeal, to the Privy Council, Lord Kingsdown, in delivering the opinion of the Judicial Committee, observed[2]: "One of the judges, in a very elaborate argument refers to Mr. Fearne's celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that, by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal; but it would be to apply a very false and mischievous principle, if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament and adjusted by a long course of judicial determinations to the wants of a state of society differing, as far as possible, from that which prevails amongst Hindoos in India." It would be difficult to imagine a clearer and stronger condemnation of the indiscriminate application of the principles of English law to circumstances where they are absolutely inapplicable, and it is a matter for regret that these observations are so often forgotten.[3] *Ram Kishore* v. *Bhoobanmoyee.*

The principle laid down in the case just referred to has been followed in several recent cases decided by the Courts in this country, though a contrary view appears to have prevailed in some of the earlier cases. In *Luckun Chunder Seal* v. *Koroona Money Dossee*,[4] which was heard by a Full Bench of the Supreme Court at Calcutta, the Court was called upon to determine the

[1] Trevor, J., at p. 250.

[2] *Bhoobun Moyee Debia* v. *Ramkishore* (1865), 10 Moore I. A., 279, at 308.

[3] See also the observations of Lord Wynford in *Mullick* v. *Mullick* (1829), 1 Knapp, P. C., 245.

[4] (1855) 1 Boulnois, 210, *per* Sir Lawrence Peel, C. J., Sir Arthur Buller and Sir James Colvile, JJ.

Luckun v. Kerooma.

validity of a testamentary disposition by a Hindu, who at the time of his death was domiciled at Chinsura, then a Dutch settlement. The disposition which limited in perpetuity the property of the testator to his descendants, in the male line, to the exclusion of descendants of females, was bad under the English law, but good under the Roman Dutch law, which was shown to have been introduced by the Dutch into their settlement in the exercise of their sovereign power. Sir James Colvile, in discussing the validity of the disposition, observed that the Court ought to consult first the Hindu law, but that, if that law were silent, they could not infer from its mere silence the validity of a testamentary disposition by a Hindoo, inasmuch as the testamentary power being unknown to the Hindoo Law, and founded upon local custom, recognized and sanctioned by judicial decisions, could not be taken to be unlimited, but was subject to be "controlled by the policy of the general law," to which the person exercising it or the property over which it was exercised was subject. The Court held, therefore, that, in the absence of any rule or authority of the Hindoo law, which could possibly affect the question, they were entitled to invoke the authority of the Roman Dutch law in respect of the property situated at the place where the testator had his domicile, and to resort to English law in respect of all properties situated beyond the limits of the Dutch territory.

Juggutsundary v. Manickchand.

The view put forward in the case I have just placed before you was, shortly after, followed by the Supreme Court in the case of *Juggutsundary Dossee* v. *Manickchand Bysack*,[1] where the learned judges, though expressing their unwillingness to apply to a Hindu Will the technical rules of construction derived from the English law, held that "the testamentary power engrafted upon the general Hindu law by the custom of Bengal, must be taken to exist, subject to those restraints which

[1] (1857) 1 Boulnois, 266. 8 Moore I. A., 76, *per* Sir James Colvile, C. J., Sir Arthur Buller and Sir Charles Jackson, JJ.

the general policy of the law imposes on the exercise of testamentary power in general." The case was then taken, on appeal, to the Privy Council ;[1] and the Judicial Committee appear to have acceded to the argument that the peculiar doctrines of the English law against perpetuities, doctrines of a technical character not founded on any principle of general jurisprudence, were inapplicable, Lord Justice Turner observing that the extent of the testamentary power of Hindoos must be regulated by the Hindu law.

The principle of these decisions was carefully examined by Sir Barnes Peacock in the case of *Gobardhon Bysack* v. *Shamchand Bysack*.[2] The learned Chief Justice, after referring to the case of *Luckun Chunder Seal* v. *Koroona Money Dossee*,[3] and expressing his dissent from that decision, went on to observe that "the validity of the will must be determined according to Hindu law and according to Hindu law alone. If that law contains no rule against perpetuities, we must hold that a devise is not, by that law, invalid upon the ground that it tends to create a perpetuity. *Gobardhon* v. *Shamchand*.

"Then why are we to resort to some foreign law which disallows perpetuities? There is no rule of Hindu law which invalidates a conveyance or a gift *inter vivos* upon the ground of its creating a perpetuity. Then why are we to seek for some foreign law to render void a bequest contained in a will of a Hindu and which is valid according to Hindu law. Imagine what a system of law we should have to administer, if we were told it was Hindu law modified by the policy and principles of English law." The learned judge then alluded to the question of perpetuity[4] and treated it as settled by the

[1] (1859) *Sonatun Bysack* v. *Juggut Sundari Dossee*, 8 Moore I. A., 66.

[2] Bourke, 282 (note). See also *Ramdhone Ghose* v. *Annund Chunder Ghose* (1864), 2 Hyde, 93. *Cf.* Sir F. W. Macnaghten, Considerations on the Hindu Law, 327.

[3] 1 Boulnois, 210.

[4] "If we are to read and give effect to the wills of Hindus, according to the light and policy of the English law, the intentions of nearly every testator will be

decision of the Judicial Committee in *Sonatun Bysack* v. *Juggut Sundari Dossee*. I ought to point out to you that the observations to which I have just now referred were explained and qualified in a subsequent case,[1] in which they were relied upon by counsel as conclusive authority for the position that there was nothing in Hindu law rendering perpetuities illegal or invalid. Sir Barnes Peacock, referring to his earlier decision,[2] explained that the case was not an authority for any such general proposition, that all that was intended to be laid down there was that the English law against perpetuities could not be engrafted upon a Hindu will, and that the answer to the question, whether the Hindu law warrants the creation of a perpetuity, either by will or a deed of gift, must depend upon the Hindu law alone, and not upon the Hindu law supplemented by English law.[3] It might have been supposed that, in the face of these authorities, the question of the applicability of the principles of English law (including the rule against perpetuities) to cases of Hindu wills, could hardly admit of serious argument. You may, therefore, be surprised to hear that, in the celebrated

Result of decisions.

frustrated. The Judicial Committee appears to have decided the question of perpetuity. That question was raised in a suit brought by Juggut Soondree. Sir James Colvile in his judgment in that case gave effect to the rule against perpetuities; the Privy Council did not expressly refer to the question, but, reversing the decree, commenced by stating that it is not improper to observe, with reference to the testamentary power of disposition of Hindus, that the extent of this power must be regulated by the Hindu law." *Per* Peacock, C. J. Bourke, p. 282, at p. 291.

[1] (1868) *Asima Krishna Deb* v. *Kumara Krishna Deb*, 2 B. L. R., O. C. J., 11 (32).

[2] Bourke, 282.

[3] The learned Chief Justice further pointed out that his remark, that the Hindu law contains no rule against perpetuities, was intended to be limited to the facts of that particular case, which related to an endowment for an idol. (2 B. L. R., O. C. J., 35). Markby, J., explained (p. 47) the earlier case as an authority for the proposition that 'it being assumed to be a principle of Hindu law, that a gift can be made to an idol which is a *caput mortuum* and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English law of perpetuities." See also *Krishnaramani Dasi* v. *Ananda Krishna Bose* (1869), 4 B.L.R., O.C.J., 231 (248) *per* Markby, J.

case of *Tagore* v. *Tagore*, which as you know arose upon the construction of the will of the munificent founder of this chair, the attempt was strenuously made to induce the Court to apply the principles of English law to the matter in hand. In spite, however, of the very learned and elaborate arguments which were addressed to the Court, Peacock, C. J., held that the doctrines of English law, including the rule against perpetuities, had no bearing on the case, and he declined to reason by analogy from those doctrines in any case in which the right of inheritance of a Hindu was concerned.[1] The case was taken, on appeal, to the Privy

Tagore v. *Tagore.*

[1] (1869) *Tagore* v. *Tagore*, 4 B. L. R., O. C. J., 103 (167).

"It appears to me that many of the doctrines of the English law, including the rule against perpetuity, have no bearing upon the will now before us; and that we cannot, in a case in which the right of inheritance of a Hindu is concerned, reason by analogy from those doctrines. For instance, the question has been discussed whether some of the devises are executory devises or contingent remainders, as though the law of contingent remainders could be applicable to the estate of a Hindu, when a contingent remainder must be supported by a freehold estate, and the Hindu law knows of no distinction between freehold estates and estates less than freehold. I am at a loss also to understand how the law of executory devises, of springing or shifting uses, or such modifications of the law of immoveable property as sprang up after the Statute of Uses, and were dependent on it, can be applicable to cases governed by the Hindu law." The learned Chief Justice then quotes a passage from Hargrave's second argument in the Thelluson Causes, and goes on to add: "The rule laid down by the Judges (in England) to prevent perpetuities—namely, that an estate cannot be tied up for a longer period than a life in being, and twenty-one years afterwards. —originated in the exercise of discretion, and, it was evidently an arbitrary one. If it had been adopted with reference to the Hindu law, the twenty-one years would probably have been sixteen, the period at which, in the case of Hindus, minority ceases. The time fixed by the Indian Succession Act is, as regards devises, a life in being and eighteen years. It is manifest that the rules against perpetuity as well as the law regarding executory devises were no part of the original Hindu law, and I cannot see by what means they have become so during the last two centuries. It is unnecessary to go further into this matter. The point appears to have been very clearly settled by the Privy Council." Sir Barnes Peacock then quotes the passages from the judgment of Lord Kingsdown in *Bhoobun Moyee* v. *Ramkishore* (10 Moore I. A., 308), and Lord Justice Turner in *Sonatun Bysack* v. *Juggut Sundari* (8 Moore I. A., 85), which are discussed above. See pp. 53—55.

Judgment of Willes, J.

Council,[1] and Mr. Justice Willes, in delivering the judgment of the Judicial Committee, said: "The questions presented by this case must be dealt with and decided according to the Hindu law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules, which have been established in England, are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty, a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in England is the trust formerly reposed in the Church to administer personal property.[2] In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased."[3] We may, therefore, accept the proposition as fairly settled, that the English doctrine of Perpetuities has no application in the case of an executory devise by a Hindu or a Mahomedan, and that the validity of the disposition must be regulated by the Hindu or Mahomedan law, as the case may be.

If you now turn to examine the provisions of the Hindu law to which reference has been made by so many eminent judges, you may be surprised to find that there is nothing in the ancient texts of that system which has any direct bearing on the question of Perpetuities. Twist our texts as we may, we search in vain for any in which the matter

[1] (1872) *Tagore* v. *Tagore*, L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.

[2] (1846) *Dyke* v. *Walford*, 5 Moore, P. C., 434.

[3] In a subsequent portion of the judgment, reference was made to the case of *Bhoobun Moyee Dabia* v. *Ramkishore* (10 Moore I. A., 279), which has been discussed above. See p. 53.

may be supposed to be even remotely dealt with. But if you look beneath the surface, you will see that this is just as it should be. Under the ancient Hindu system, when all over the country you had the joint family of the normal type as the unit of society, when the joint Mitakshara family had not yet been completely disintegrated by the operation of diverse causes, not the least potent of which has been a series of judicial decisions for the protection of favoured creditors,—in those days, any theory of a rule against perpetuities could hardly be conceived; for the land belonged to the family or to the village, and, its possession and enjoyment might, perhaps, change hands within the circle of joint owners; but, as the conception of individual ownership was absolutely unknown, none could claim the right of alienation and much less the right of testamentary disposition. Indeed, as has been acutely remarked, the Hindu joint family is the true and ancient perpetuity. But from the mere fact that you cannot discover among the ancient texts of Hindu law any which expressly prohibit the creation of perpetuities, you must not rush to the inference that a devise is not by that law invalid upon the ground that it tends to create a perpetuity.[1] The mere silence of any system of law, as to the legal effect of a particular juristic act, is in no way conclusive upon the question of its validity; the mere fact that, in a particular system of law, rights of property are not accurately defined and classified, does not justify the inference that those rights, whether primary or derivative, are unlimited, for who has ever heard that the measure of law in any country, even in a country blessed with an ideal code, is express command or express prohibition. On the other hand, you will not forget that the system of Hindu law, as it has reached us, is not and does not profess to be exhaustive; it is a system which contains within itself the elements

Ancient Hindu texts.

[1] See the speeches of Hon'ble Mr. Fitz James Stephen in the Imperial Legislative Council, upon the provisions of the Hindu Wills Bill (Proceedings, Vol. IX, pp. 14, 338).

of expansion, a system in which new customs and new propositions, not repugnant to the old law, may be engrafted upon it from time to time, as the change of circumstances and the progress of society imperatively demand. Manu[1] says:

Manu.

"A king who knows the sacred law must enquire into the laws of castes, of districts, of guilds and of families, and thus settle the peculiar law of each.

"What may have been practised by the virtuous, by such twice-born men as are devoted to the law that he shall establish as law, if it be not opposed to the customs of countries, families, and castes."

Brihaspati[2] is more emphatic still:

Brihaspati.

"A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice."

Judicial legislation.

This is nothing more than the process of judicial legislation, which is one of the recognised sources of law in many civilised states, and which has thus been described by an eminent English judge:[3] "The case is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all, and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and, for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not

[1] Institutes, VIII, 41, 46 (tr. Buhler); see also I, 108, 110.

[2] Jagannath, Digest, tr. Colebrooke, Book I, tit. 78; Book II, tit. 17. Sacred Books of the East, vol. 33, p. 284, where Dr. Jolly translates the text somewhat differently. See also Jagannath, Book I. tit. 50, 98, 99. *Cf.* Max Müller, Ancient Sanskrit Literature (1860), p. 50.

[3] Mr. Justice James Parke in *Mirehouse* v. *Rennell* (1833), 1 Cl. & F., 527 (546).

plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised." Keeping this principle steadily in view, a principle of paramount importance for the interests of law as a science, we proceed to examine such of the leading principles of Hindu law, as may, by analogy, furnish a solution of the question, whether the creation of perpetuities is at all in accordance with the spirit of Hindu law,[1] and if so, within what limits they ought to be allowed.

Does Hindu law recognize perpetuities?

[1] Goldstucker, in one of his Opinions on Privy Council Law Cases, discusses, in the following manner, the question whether the Bengal School of Hindu law favours or discountenances the principle of perpetuity as applicable to the right of inheritance:

"In the law of Bengal, there occurs no distinct statement relating to the theory of perpetuity as applicable to the right of inheritance. But from the philosophical basis on which the law of Bengal rests, it must be inferred that it discountenances such a theory.

For this basis is the Nyaya, and more specially that division of it called the Vaiseshika philosophy, and some discussions raised by the chief authorities of the Bengal School, must, therefore, be understood in the light of that system of philosophy. This also results from the sameness of the philosophical terms used by both. (See Colebrooke on the Hindu Schools of Law; 1 Strange, Hindu Law, 316).

Now, the Vaiseshika lays down the proposition that there are seven Padarthas or Categories, under which all material objects (such as earth, water, &c.) and all ideal existences (such as cause, effect, &c.) are comprised. Besides these, it maintains, there are none; and it rejects, therefore, any explanation, for instance, of cause and effect, which, instead of being evolved from any of these seven categories, would resort to the assumption of another principle not contained in them. Goldstucker.

The following passage from the Bhasha Parichchheda, one of the fundamental works of the Vaiseshika, together with its commentary as given in the Siddhanta Muktavali, will corroborate this statement.

Text: 'Substance, Quality, and in like manner Action, Genus, with Difference and Concretion, and in like manner Non-existence these seven are called the categories.' Bhasha Parichchheda.

Commentary: 'Thereupon (that is, on its being laid down that the categories are seven) the author of the Upamana—Chintamani raises the doubt whether a right to be treated as separate categories does not belong to Power and Resemblance, seeing that these differ from

Testamentary capacity of a Hindu.

In the first place, you will remember that the testamentary capacity of a Hindu has now been established beyond all possibility of dispute. It is not necessary for us to

all the seven categories. How is it (he asks) that these (seven) alone are categories, when there is a separate categoric nature in Power, Resemblance, &c. To explain: A burn is not produced by fire when attended by a gem (of the kind which is regarded as possessing the power to neutralize the operation of fire) or the like; but, by that devoid thereof, it is produced. In this case I infer that a cauterizing power in the fire is destroyed by the gem or the like, and is reproduced by the removal of the gem, or the like, which acted as a neutralizer. So, too, Resemblance is a separate category,—for it is not included under any one of the (first) six categories, seeing that (unlike any of these) it exists even in Genus—for we recognise Resemblance in the instance that, 'as the generic nature of cows is eternal, so in like manner is that of horses also.' Further, it cannot fall within the category of Non-existence: because, that such a thing (as Resemblance) exists, is believed (by every one).

But, if all this be asserted, it is not so—for, as regards the burning effect of the fire, &c., in the absence of the gem, &c., it is improper to postulate an endless set of Powers, together with the previous Non-existence and also the Annihilation thereof, when the result may be properly accounted for, either by the independent action (of the fire), or by assuming as the cause the absence of the (neutralizing) gem, &c. And you need not say, 'How then does burning take place when both the neutralizer is present and also a neutralizer of the (fire-neutralizing) gem?'—for, what I regard as the cause is the absence of the genus gem (or of all gems whatsoever), which implies the absence of (those gems that are) neutralizers. Resemblance also is not another category, but it consists in the possession of various characters belonging to any given thing, whilst being at the same time something other than the thing; as, for example, there is a resemblance to the Moon in a face, which being something not the Moon, yet possesses the pleasing character, &c., which the Moon possesses.' (Bhasha-Parichchheda, ed., Ballantyne, 1851, p. 8.)

ayabhaga.

In other words, as regards the rejection of a category Power: Since the independent action of fire is sufficient to account for the producing of a burn—according to the Vaiseshika, it would not be allowed in a special case to resort to an assumption of the non-existence of the action of fire and the subsequent annihilation of that non-existence, since this would be assuming causes which are remote, and arbitrarily creating endless categories.

This reasoning, and in the very terms of the Vaiseshika, is applied by Srikrishna Tarkalankara, the great authority of the Bengal School, to the following passage of Jimutavahana's Dayabhaga (Chap. I, § 7) which says:

'Nor can it be affirmed, that partition is the distribution to particular chattels, of a right vested in all the co-heirs, through the sameness of their relation, over all the goods. For, relation, opposed by the co-existent claim of another relative, produces a

discuss here the perplexing question which taxed the ingenuity of lawyers for over half a century, namely, whether the idea of a will is wholly unknown to Hindu

Origin of Hindu Wills.

right, figuratively implied by (the term) partition, to questions only of the estate: since it would be burdensome to infer the vestings and divestings of rights to the whole of the paternal estate; and, it would be useless, as there would not result a power of aliening at pleasure.'

For, in regard to this passage, Srikrishna Tarkalankara argues as follows:

'Now, if (you say)—the co-existence of one relative, on account of the sameness (of the rights of all the relatives) being a bar to the proprietary right of another relative, none of them has a right to any portion (of the inheritance), since this bar exists. My answer is:

Since property depending on relation and (the fact of) the right to such property having a previous Non-existence are (notions) closely connected, the proprietary right of one relative bars the right to property depending on relation, when belonging to another relative. (For), since you must admit that after division there is a proprietary right in a special portion (of the property), and since (from your admission it would follow that) this right had a previous Non-existence, there is no incongruity in my reply.

He (namely, Jimutavahana) shows that the co-existence of one relative sufficiently accounts for opposing (the claim of another relative) in the words 'since it would be burdensome to infer the vestings, &c.' Their sense is this: the collective sum of the proprietary rights is equal to the number of all the relatives concerned in the property left by a father, or other (relative). (There would be) vestings and divestings of these (rights). (But such an assumption would be burdensome), for considering that it would then be necessary to assume such endless categories (as a series of vestings and divestings), the assumption of opposition (of one right by another co existent right) is more easy (that is, less remote, and therefore the only one consistent with the notions of the Vaiseshika.'

Srikrishna.

On the theory of perpetuity, the right of an heir would not be derived from his relationship to the owner of the property who immediately predeceased him, but from the title conferred on him by the testamentary or other disposition of a remote ancestor. In such a case, then, the effect of inheritance, instead of being accounted for from an immediate cause, would depend on a remote cause, or a series of remote causes, and these the Vaiseshika would reject as belonging to the category of endless powers.

In my opinion, therefore, it results from the alleged words of Jimutavahana and Srikrishna Tarkalankara that these authorities not only do not admit a mode of inheritance which would prevent the alienation on the part of the inheritor of the property inherited, but also do not recognise a title to inheritance which would be derived from a remote cause, such as the principle of perpetuity, the latter being contrary to the spirit and a proper construction of the Bengal law." (2 Literary Remains, 227.)

Settled doctrine.

law; nor is it necessary for us to enquire whether the origin of Hindu wills is to be traced to the example of the Mahomedan law which was the law of the rulers of the land for many centuries, or to the influence of English lawyers in the Supreme Courts, or to the immense religious influence of the Brahmans, or, to the evolution of the same chain of legal ideas to which they are known to owe their origin and development in other parts of the civilized world. None of these questions can be of any practical importance to us, for, as was well pointed out by Sir James Colvile in the case of *Collector of Madura* v. *Moottoo Ramalinga*,[1] "the duty of an European judge, who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has been sanctioned by usage; for under the Hindu system of law, clear proof of usage will outweigh the written text of the law." Nor do I purpose to review the long current of decisions which sometimes flowed in favour of the validity of wills, and, at others in precisely the reverse direction.[2] It is enough for us to start with the now settled doctrine that whatever property is so completely under the control of a Hindu testator that he may give it away during his lifetime, he may also devise by will.

The second principle to which I wish to invite your attention is that under the Hindu law particular estates

[1] (1868) 12 Moore I. A., 397 (436).

[2] In Bengal, the validity of wills was finally established by the unanimous opinion of the Judges as well of the Supreme Court as of the Sudder Court in the case of *Juggomohun* v. *Neemoo* (1831), Morton, 90; see also *Motee Lal* v. *Mitterjeet* (1836), 6 Sel. Rep., 73 (new ed., 85); *Nagalutchmee* v. *Gopoo*, 6 Moore I. A., 309 (344), *per* Lord Kingsdown; *Beer Pertab* v. *Rajender Pertab* (1867), 12 Moore I. A., 1; *Tagore* v. *Tagore*, L. R., I. A., Sup. Vol., 47, *per* Willes, J. In Madras, the question was settled by the case of *Nagalutchmee* v. *Gopoo* (1856), 6 Moore I. A., 309 (344); see also *Vallinayagam* v. *Pachche* (1863), 1 Mad. H. C., 326 (339). In Bombay, the leading decision is *Narottam* v. *Narsandas* (1866), 3 Bom. H. C. (A. C. J.), 8, *per* Westropp, C. J.

and limited interests in property may be created. It has, indeed, been maintained by a very learned judge [1] that the idea of ownership in Hindu law is something very different from what it is under the English law where ownership is treated rather as an abstraction than as a reality, is made to shift from person to person as events happen, and may also be limited in quantity and quality. But neither principle nor authority is in favour of the theory that interests in property, limited in quantity or quality, are not recognized by the Hindu law. The first illustration which will suggest itself to you is the special and qualified interest taken by a widow, daughter, or mother when property is inherited by any of them in her character as such; apart from her extremely limited right of alienation, the most remarkable incident of the estate taken by her is that, after her death, it does not descend to *her* heirs, but to the heirs of the last male from whom she inherited; she never becomes a fresh stock of descent.[2] Of course, it would be inaccurate to describe her interest as a life-estate in the sense in which that term is used in the English law, but it would be equally erroneous to say that she takes an unrestricted interest in the property. And you will not here fail to observe that not only does the Hindu law recognize a qualified estate of the nature I have just described, but it further recognizes a succession of such estates; for it is quite conceivable that the property of a person may, after his death, be inherited successively by his widow, daughter and mother before it reaches the hands of a full owner. The next illustration I take, is furnished by the law of adoption. Consider a case in which a person leaves authority to his widow to adopt in the event of the death without issue of an existing son, or, a case in which permission is given to a widow to adopt several sons in succession. Within what limits and subject to

Qualified interests recognised in Hindu law.

Succession of qualified estates.

[1] Markby, J., in *Krishnaramani Dasi* v. *Ananda Krishna Bose* (1869), 4 B. L.R., O. C. J., 231 (254).

[2] *Collector of Masulipatam* v. *Cavaly Vencata* (1864), 8 Moore I. A., 529 (550).

what restrictions a power of adoption so conferred can be validly exercised, it is not necessary to discuss here; all that I wish you to notice is that in cases in which the power is validly exercised, the result of allowing the subsequently adopted son to take the estate by inheritance from his adoptive father, is precisely the same as if the testator had restricted the interest of his surviving son or of each successive adopted son, to a life interest, or had limited it over (on failure of male issue of such son) to an adopted son of his own.[1] Again, as pointed by Sir Barnes Peacock in the case of *Tagore* v. *Tagore*,[2] "if a testator can disinherit his son by devising the whole of his estate to a stranger, there seems to be no reason why he should not be able to divide his estate by giving particular and limited interests in the whole of the property to different persons in existence, or who may come into existence during his lifetime, to be taken in succession, as well as by giving his whole interest or bundle of rights in particular portions of lands included in his estate to different persons." But in view of the decision of the Judicial Committee in *Rewun Persad* v. *Radha Beeby*[3] the subject is really not open to speculation. In that case, by an instrument in the nature of a testamentary disposition made by a Hindu governed by the Mitakshara law, the testator gave his widow a life-estate in all his property, and he directed that, after the decease of his widow, his brother, and after the death of his brother, his brother's sons, should take one-half. *B*, the brother, died in the lifetime of the testator's widow, leaving him surviving his two sons, *C* and *D*. *C* afterwards died in the lifetime of the testator's widow. As *C* and *D* were divided brothers, upon the death of the testator's widow, the widow of *C* claimed to be entitled to the share devised to her husband, namely,

Rewun Persad v. *Radha Beeby.*

[1] *See* on this point the case of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1865), 10 Moore I. A., 279, at 310; *Jatindranath* v. *Amrita Lal* (1900), 5 C. W. N., 20.

[2] (1869) 4 B. L. R., O. C. J. 103 (166).

[3] (1846) 4 Moore I. A., 137.

one-half of the moiety. It was held by the Judicial Committee that *C* and *D*, the sons of the brother, had each of them a vested interest in one-fourth share, not to come into actual enjoyment till the death of the widow, that there was no contingency, but only an uncertainty as to the period of enjoyment, and that it was not necessary that the share of *C* should be reduced into possession during his lifetime to enable his widow to succeed to it. Here then was clearly recognized the validity of an estate for life in the widow of the testator, and, vested estates in the two sons of the brother, the actual enjoyment of the expectant interest being postponed till the termination of the antecedent life-estate. Similarly, in the case of *Tagore* v. *Tagore*,[1] the Judicial Committee overruled the contention that Hindu law recognizes only one entire estate in land and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder and so forth, Mr. Justice Willes observing that "in the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will."

Tagore v. *Tagore*.

The third principle which you have carefully to bear in mind is that, under the Hindu law,[2] to complete a gift, it is ordinarily necessary that there should be concurrence at the same moment of the will of the donor and donee in passing some definite existing object from the one to the other; in other words, as put by Lord Justice Mellish in *Hill* v. *Wilson*,[3] in order

Requisites of a valid gift.

[1] (1872) L. R., I. A., sup. vol., 47 (75).

[2] "Gift consists in the relinquishment of one's right, and the creation of the right of another; and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise." Mitakshara, III, §§ 5–6, tr. MacNaghten, in 1 Mac. H. L., 212, 217; Viramitrodaya, p. 31; Dayabhaga, Ch. I, paras. 21—24.

[3] (1873) L. R., 8 Ch. Ap., 888 (896).

to make out a gift, you must shew not only that the object of the gift was sent as a gift, but that it was received as a gift, for it requires the assent of both minds to make a gift as it does to make a contract. It follows, therefore, as a necessary consequence, that the donee must be a person in existence capable of taking at the time the gift takes effect,[1] that is to say, in the case of a gift *inter vivos*, he must be in existence at the date of the gift, and in the case of a testamentary gift, he must be in existence at the death of the testator.[2] To the rule so laid down there are two apparent exceptions, namely, the case in which the donee is an infant in the womb, and the case in which the donee is a son to be adopted by the widow of the testator under an authority from him. I need hardly remind you that, by a well-recognized fiction of law, persons of both these classes enjoy in many instances the rights and privileges to which they would have been entitled if they had been in actual existence at the death of their father.[3] But subject to these exceptional cases, which only serve to prove the rule, the law is plain, that the gift to be operative must be to a donee in existence and capable of accepting the gift at the time it takes effect. It is essential that you should bear this rule accurately in mind, for you will find that the law of wills, as applicable to Hindus, has been moulded upon the law of gifts.[4]

Donee must be in existence.

Exceptions.

[1] *Tagore* v. *Tagore* (1872), L. R., I. A., sup. vol., 47 (67), *per* Willes, J.

[2] The time when the gift takes effect does not refer to the possible time of receipt by the donee. See *Tagore* v. *Tagore* (1872), L. R., I. A., sup. vol., 47 (70).

[3] Consider, for instance, the rights of a son who was in his mother's womb at the time of partition, *Kalidas* v. *Krishan* (1869), 2 B. L. R., F. B., 103, at 121; *Yekeyamian* v. *Agniswarian* (1869), 4 Mad. H. C., 307, or at the time when succession opens out *Lakhi* v. *Bhairab* (1833), 5 Sel. Rep., 315 (new ed., 369); *Berojah* v. *Nubokissen* (1863), Sev., 238; *Keshub* v. *Bishnopurshaud* (1860), Sev., 240. As to the extent to which the rights of an adopted son relate back to the death of the father, see *Bamundoss* v. *Tarinee* (1850), Beng. S. D. A., 1850, p. 533; (1858) 7 Moore I. A., 169.

[4] *Tagore* v. *Tagore* (1872), L. R., I. A., sup. vol., 47 (68), where Mr. Justice Willes says:—"The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*.

In the light of these principles, let us consider the limits within which the testamentary power of a Hindu may be exercised, the bounds within which he may create future interests in his property, but beyond which he moves at his peril. The leading decision on the subject is the case of *Soorjeemoney Dossee* v. *Denobundhoo Mullick*,[1] which twice came before the Privy Council. In that case, a Hindu testator, by his will, made an absolute gift of one-fifth of all his property to each of his five sons, subject to the condition that, in the event of any of the five sons dying without a son or a son's son, there was to be a gift over to such of the other sons or son's sons as might then be alive. The event contemplated happened, as one of the sons, who all survived their father, subsequently died, leaving no male issue, but a widow whose claims gave rise to this litigation. Lord Justice Turner held, in the first instance, that the interest taken by each of the sons was not contingent, that each of them was entitled, in any event, to enjoy during his life the income of his share of the property, and that, consequently, the widow of the deceased son was entitled, not only to a fifth of the surplus income which had accumulated, since the testator's death, during her husband's lifetime, but also to the increment arising out of such accumulations.[2] In a subsequent suit the lady contested the validity of the disposition contained in the will, and claimed to be

Limits of testamentary power of Hindus.

Soorjeemoney v. Denobundhoo, Turner, L. J.

The same may be said of the Roman law, as pointed out by Mr. E. C. Clark in his interesting treatise upon Early Roman law (p. 118) in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and, does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator, as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of wills has grown up, so to speak, naturally from a law which furnishes no analogy but that of gifts."

[1] (1857) 6 Moore I. A., 526; (1862) 9 Moore I. A., 123.

[2] 6 Moore I. A., 526.

entitled to the fifth share in the estate which had devolved upon her husband. Sir Barnes Peacock, who delivered the judgment of the Supreme Court, held that there was nothing in Hindu law to prohibit such a disposition, and dismissed her claim. This decision was affirmed, on appeal, by the Privy Council, and Lord Justice Knight Bruce, who delivered the judgment of the Judicial Committee, observed:[1] "We are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest, upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognized in practice. Their Lordships consider that the testator, in making this provision, did not infringe or exceed the powers given him by the Hindu law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue." This conclusion, you will observe, is in perfect harmony with the principles discussed above, and we may take it as settled, that a devise or bequest for a life or lives in being, with a gift over, vesting the property absolutely at the close of such life or lives, is good. This decision was sought to be relied upon in the case of *Tagore* v. *Tagore*,[2] as an authority for the proposition that such a gift over is valid, if the donee is alive when the antecedent life-estate determines; the Judicial Committee, however, overruled this contention, and held that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and, therefore, must either in fact, or in contemplation of

Soorjeemoney v. *Denobundhoo*, Knight Bruce, L. J.

Settled principle.

[1] 9 Moore I. A., 135.

[2] L. R., I. A., sup. vol., 47 (69).

law, be in existence at the death of the testator.[1] The rule, as finally settled, may, consequently, be taken to be, that a Hindu testator can give property, whether by way of remainder or by way of executory bequest, upon an event which is to happen immediately on the close of a life or lives in being, to a person who, in fact, or in contemplation of law, is in existence at the death of the testator. Rule.

From this rule, which defines what a Hindu testator can do by way of a valid disposition of his property, we must pass on to another which defines what he cannot do. It was laid down by the Privy Council in the case of *Tagore* v. *Tagore*[2] that, although the extent of the testamentary power of a Hindu is not to be regulated by the technical rules prevailing in England, yet it must be exercised subject to those general principles affecting the transfer of property which must prevail wherever law exists. One of such principles, directly applicable to the matter in hand, was thus described by Mr. Justice Willes: "The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down, or, in the case of custom, recognized by the State, not merely for the benefit of individuals, but for reasons of public policy.[3] It follows directly from this that a private individual who attempts by gift or will to make property inheritable, otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjomonee Dossee* v. *Denobundhoo Mullick*[4]: A man cannot Fundamental principle affecting transfer of property.

[1] *See* also *Krishnaramany Dasi* v. *Ananda Krishna Bose* (4 B. L. R., O. C. J., 231), where Peacock, C, J. (p. 279), held the devise void beyond the lives in being at the death of the testator, but Macpherson, J. (p. 291), expressed the contrary view.

[2] (1872) L. R., I. A., sup. vol., 47 (64).

[3] Domat, Civil Law, § 2413 (1853), Vol. II, p. 5; (1737), Vol. I, p. 578.

[4] 6 Moore I. A., 555.

create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of public policy." In other words, although a testator is at liberty to alter the order of succession by will, he cannot always alter the nature of the estate which will vest in the devisee of his choice; he is free to direct who shall take the estate at his death, but the estate conferred, both in respect of quality and quantity, must be such as is recognized in Hindu law, and is not opposed to any principles of public policy. In the case before the Judicial Committee, the will was, in effect, an elaborate attempt to create qualified estates of inheritance (estates tail) descendible to heirs male of the body according to the rule of primogeniture, and, the disposition was held to be invalid by reason of the incompetency of an individual member of society to make a law whereby a particular estate created by him should descend in a novel line of inheritance, different from that prescribed by the law of the land; it was quite clear, of course, that an estate in tail male, descendible by the rule of primogeniture, such as that which the testator had attempted to create, was not only not authorised by Hindu law, but was wholly repugnant to the fundamental doctrines of that system.[1] I need not detain you longer with the observation that the same conclusion as to the invalidity of the devise follows equally well from the principle that the donee must be in existence at the death of the testator.[2]

Estate must be recognized by Hindu law.

[1] *See* a very instructive discussion of this point by Peacock, C. J., in the Court of Appeal below, 4 B. L. R., O. C. J., 171, where it is pointed out that the creation of an estate in tail male, violates the first principles of the Hindu law of inheritance based on the doctrine of spiritual benefit; *see* also the judgment of Norman, J., at p. 216. *See* also *Arumugam* v. *Ammi* (1863, 1 Mad. H. C., 400).

[2] See the whole law summarised in *Kristoromoni Dasi* v. *Narendrakishna Bahadur* (1888, I. L. R., 16 Cal., 383; 16 I. A., 39), where Lord Hobhouse said: "The *Tagore Case* (L. R., I. A., Sup. Vol., 47), decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the

Rules not exhaustive

You will observe, now, that the two rules we have explained are not by any means exhaustive; the first rule lays down the extent to which a Hindu testator may safely go; the second lays down the extent to which he cannot go; but I fail to find any authorities which precisely mark out the bounds of his testamentary power, or which discuss the extent, *if any*, to which he may go beyond the limits described in the first rule. Thus, for instance, it has been doubted, but never decided, whether a gift over of an estate to take effect on events which may happen, not upon the close of a life in being, but at some uncertain time during its continuance, is valid under the Hindu law.[1] To take another illustration, although, by the Hindu law a bequest may be valid, if the vesting of the thing bequeathed be postponed till the close of a life or lives in being, it is undecided whether the bequest would be valid, if the vesting be delayed for a term beyond the lifetime of one or more persons living at the decease of the testator. Again, if such an additional term is allowable, the further question arises, what are the limits of such additional term; are we to say that such additional term may be the period of minority of the person to whom, upon attainment of full age, the bequest is to belong, or, are we to say that such period may be a term in gross, as under the English law, fixed with reference to some supposed principle of natural justice, public expediency or convenience. In the absence of any authorities upon these points, it is clear that such

testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick Case* (9 Moore I. A., 123); and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore Case*."

[1] *Ram Lal Mookerjee* v. *Secretary of State for India* (1881), L. R., 8 I. A., 46 (62).

questions are more easily asked than answered; but, I confess, it is rather difficult to see, upon analogy, to what rule or principle of Hindu law, such extensions of the rule can, in any way, be justified. Indeed, when these points come up for actual decision, it will be by no means unprofitable to remember that they form precisely the class of cases in which the doctrines of English law may be a little too readily borrowed and misapplied. In the first place, as pointed out by Sir Barnes Peacock,[1] to introduce the artificial rules of the English law and to graft them upon the Hindu law for Hindus would create the greatest injustice and the greatest inconvenience; it would be a composite system wholly unknown to the Hindus and would cause such uncertainty that no man would know what his rights are, and no lawyer could safely advise him upon the subject. Besides as the Hindu law of inheritance is based upon the Hindu religion, the introduction of rules adopted by analogy to the English law of primogeniture, of entails, of executory devise or of contingent remainders, would mean the incorporation of principles which are at variance with the religion of those to whom the law is administered. In the second place, there is a still stronger objection to the application of the doctrines of this branch of the law of England, inasmuch as those doctrines themselves are, unfortunately, not based on the solid foundation of reason. If you have accurately followed the story of the origin and growth of the rule against perpetuities in English law, you could not have failed to observe that its foundation was accidental, and, its development neither logical nor harmonious. The true theory of the rule against perpetuties, in so far, of course, as any essentially artificial rule can be said to have a theory at all, is, as I have told you, that no future interest must begin beyond lives in being; this was definitively settled in the *Case of the Duke of Norfolk*. But the rule did not stop here;

Reasons for not borrowing principles of English law.

[1] *Tagore* v. *Tagore*, 4 B. L. R., 103 (169).

soon after, an attempt was made to extend the period beyond lives in being; two of the most eminent lawyers of the age strenuously set their face against it, but their decision was reversed by what has not inaptly been called a body of peers not learned in the law.[1] Then came the case of *Stephens* v. *Stephens*, where there was a gift over on the death of a devisee under twenty-one; the Court unwillingly decided in favour of the validity of the gift over, partly by reason of the decision in *Taylor* v. *Biddal*[2] (which was decided before the *Case of the Duke of Norfolk*, and, is not very intelligibly reported), and partly by reason of the fact that there was no real restraint on alienation as the devisee in the case was an infant. If this case was intended to lay down a general rule of law apart from the particular facts, it is not difficult to see that the decision was unjustifiable on principle, and the reason assigned is traceable to a confusion of ideas. In cases where we have to examine the validity of an estate on condition precedent, the question to be asked is, when must the contingency happen, if at all? I venture to think that it is inconsistent with the fundamental principles of the subject to ignore this question, and, to ask the other question, when will the devisee be in a position to convey an absolute interest. If you do so, you ignore when the future interest would begin, and, you say that as an executory devise may, admittedly, be postponed to the end of a life-estate, there can be no harm in extending the time till the devisee reaches twenty-one, for until he becomes of age, he cannot convey the land, even if there is no executory devise. But the difficulty here is twofold. In the first place, every reason which can be urged for extending the period for creating an executory devise to a minority after a life in being, can now be used for extending it to

Growth of the rule in English law.

Real test

[1] When the decision of Lord Somers and Chief Justice Treby in *Lloyd* v. *Carew* (Pre. Ch., 72, 106; Shower, P. C. 137) was reversed by the House of Lords on the 13th January 1698, with the exception of the Chancellor, there was no law Lord in the House.

[2] 2 Mod., 289; Freeman, 243.

Twofold difficulty.

a minority after an absolute term of twenty-one years. To take one concrete illustration, suppose a devise is made to such of the great grand-children of the testator as are alive twenty-one years after his death; what objection can there be, if he adds a provision that if any such great grand-child dies under twenty-one, his share shall go over, for until he attains majority, he cannot convey his share whether there is a gift over or not. But if such reasoning is not admissible now, it ought not to have been allowed in the first instance. In the second place, if the reason for the extension is the minority of the devisee and the consequent impossibility of alienation, the rule ought to be framed accordingly, and there is no foundation in principle for the later decision in *Cadell* v. *Palmer* that the added term of twenty-one years is a term in gross, independent of the infancy of the person intended to take; that decision, then, must be defended solely on the ground of the prior decision in *Lloyd* v. *Carew*. I trust I have now made it clear to you that the form into which the rule against perpetuities has been ultimately moulded in the English law, is arbitrary and accidental, and, cannot really be justified on the basis of any consistent theory or principle.[1] It seems to me

[1] Lord Brougham, who delivered the opinion in *Cadell* v. *Palmer* (1832, 1 Cl. & F., 372), made no secret of his dissatisfaction at the illogical process by which the decision was arrived at. Thus in *Tollemache* v. *Coventry* (1831, 2 Cl. & F., 611, 624), he said: "*Cadell* v. *Palmer* went, in my opinion, no further than at least one case of great authority, and decided in this House, though it may have gone further than the original reason of the rule authorized." Again, in *Phipps* v. *Ackers* (1835, 9 Cl. & F., 583, 598), he said: "The Courts, and even this House have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error, and recurring to more accurate views. Accordingly, when *Cadell* v. *Palmer* was argued in this House, I advised that your Lordships should abide by the received extension, which had for a great length of time been given to the period within which an executory devise might be held good." Similarly, in *Long-annon* v. *Smith* (1845, 12 Cl. & F., 546, 629), he observed: "The rule of law is the term in gross of twenty-one years after the life or lives in being; that was clearly laid

extremely doubtful, therefore, whether under the Hindu law, we are entitled to go beyond the limits laid down in the case of *Soorjeemoney Dossee* v. *Denobundhoo Mullick*;[1] at any rate I cannot discover any analogy which would justify the extension; but, assuming that an additional period is allowed, there cannot be much room for doubt that its limits ought to be fixed by reference to the provisions of sec. 101 of the Succession Act which, it has been said, is "in accordance with convenience and with the general spirit of the Hindu law."[2]

Limits ought not to be extended.

down by your Lordships upon my recommendation, after hearing the learned Judges in the case of *Cadell* v. *Palmer*, and, it is quite unnecessary to go back to the foundation of the law; I have a strong opinion, which I believe is joined in by the profession at large, that it arises out of an accidental circumstance, out of a confusion, I may say, a misapprehension in confounding together the nature of the estate with the remedy at law by fine and recovery, which could not be applied till a certain life came to twenty-one years." To a similar effect are his observations in *Cole* v. *Sewell* (1848, 2 H. L. C., 186, 233): "The rule that you can take a gross term most clearly arises from a mistake. The law never meant to give a further term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate; but what the law meant to say was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the estate cannot be affected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one, he could not cut off the entail. For that reason and in that way, it has crept in by degrees. *Communis error facit jus*, and that rule never was applied more accurately than in *Cadell* v. *Palmer*." *See* also an elaborate criticism in Sugden's Law of Property, pp. 313—324.

[1] 9 Moore I. A., 135.

[2] *See* the subject referred to in *Krishnaramani Dasi* v. *Ananda Krishna Bose* (1869), 4 B. L. R., O. C. J., 231 (292), where Macpherson, J., says: "The creation of a perpetuity is unknown to Hindu law, and is contrary to its general principles; to allow and support perpetuities is against public convenience and public policy, and is generally mischievous. The same considerations which led the Courts in England to comprise within certain bounds the power of persons to tie up their property, apply with not less force in this country; and the creation of perpetuities being, as it seems to me, even less in accordance with the spirit of the Hindu law than it was in accordance with that of the English law, it ought not upon general grounds of public

Statutory provisions.

You may imagine, perhaps, that the discussion, upon which we have been hitherto engaged, as well as the solution of the difficulties to which I have just now alluded, are matters rather of academic than of any practical interest, in view of the provisions recently added to the statute book by the Indian legislature.[1] The interpretation put upon section 3 of the Hindu Wills Act, however, leaves matters where they were before the Legislature interfered, and, we may be almost certain that a similar restricted interpretation will be put upon the last clause of section 2 of the Transfer of Property Act.[2]

policy and convenience to be permitted. If it be asked what precise limit I would prescribe, and whether I would apply here the English rule by which the vesting of an estate may be suspended for a life or lives in being and twenty-one years afterwards, I should answer that I do not think the English rule necessarily ought to be applied, because it is founded on a wholly different state of things. Twenty-one years, for instance, is not the period of minority among Hindus. The Indian Succession Act, sec. 100, enacts, that when a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed. And sec. 101 says, no bequest is valid, whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. It is to be observed that according to this Act (sec. 3), minority lasts until the age of eighteen years is completed. It may be that the rules laid down in these sections and applicable to persons falling within the provisions of the Succession Act, might be properly applied to Hindus as being quite in accordance with convenience and with the general spirit of the Hindu law. But it is unnecessary for me to say where the precise limit ought to be fixed, further than to say that I think that a devise or bequest for a life or lives in being, with a gift over vesting the property absolutely in persons alive at the close of the life or lives, is good, and ought to be upheld as being in itself reasonable and convenient, and as being in no way contrary to Hindu law."

[1] Indian Succession Act, sec. 101; Hindu Wills Act, sec. 2, sec. 3; Transfer of Property Act, sec. 14.

[2] "The saving clause in the Transfer of Property Act is at least as wide in its terms as that in the Hindu Wills Act," *per* Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett* (1886), I. L. R., 12 Cal., 663 (669). The Indian Law Commissioners, in their Report (1879, p. 28), say: "The Privy Council has already ruled that estates cannot be created

In the case of *Alangómanjari Dabee* v. *Sonamoni*

by Hindus in contravention of the principles which underlie the Thellusson Act, or subject to conditions which are void for repugnancy. The rules contained in secs. 10 to 35 impugn, as far as our experience goes, no rule or practice of Hindus or Mahomedans, or other sects recognised in India, as enjoying special personal laws, unless it may be, the now obsolete practice among the Mahomedans, of devoting property to the family of a particular saint. But, to avoid any disturbance of rights enjoyed under personal laws, sufficient provision is made by the Bill."

If it were allowable to refer to proceedings of the Legislative Council (*Administrator-General* v. *Premlal Mullick*, 1895, I. L. R., 22 Cal., 788, P. C.), we might refer to the following extract from the speech of the Hon'ble Mr. Evans in the Imperial Legislative Council on the 26th January 1882 (Proceedings, Vol. xxi, p 74):

"In Chapter II (of the Transfer of Property Bill), several rules were introduced from the Succession Act, 1865, defining the limits within which property could be tied up by settlement *inter vivos*, and laying down the rule restricting perpetuities. He had always been apprehensive that these rules would unduly extend the powers now possessed by Hindus (under the rule in the *Tagore Case*) of tying up the properties after their deaths. The rule in the *Tagore Case*, which prohibited gifts or bequests to unborn persons, was now the Hindu law as declared by the highest tribunal, except so far as the rules now proposed to be embodied in the Act, had been made applicable to the wills of Hindus in Bengal by the Hindu Wills Act, 1870.

Transfer of Property Act.

The Hindu Wills Act was passed before the Privy Council had finally laid down the doctrine that no interest could by Hindu law be created in favour of an unborn person, which doctrine, as they pointed out, obviated the necessity for any rule against perpetuities under Hindu law, and also explained why no such rule could be found in the Hindu law. How far the Hindu Wills Act did, in fact, abrogate, in the case of wills in Bengal, the rule in the *Tagore Case*, was a disputed point now in course of settlement by the Courts. It appeared to him that the question whether extended powers o tying up property should be granted by legislation to Hindus, was one of grave public policy not to be lightly settled.

Mr. Evans' difficulties on this point had been removed in a singular manner. The Hon'ble Maharaja Jatindra Mohan Tagore and the Hon'ble Raja Siva Prasad, conceiving, in common with many of their fellow-countrymen, that the rule in the *Tagore Case* did not correctly represent the Hindu law, and that Hindus were by their own law, empowered to tie up their property for ever without any restriction, had rejected the extensive powers conferred upon them by the Bill as too limited, and had asked that a clause should be added to Chapter II, providing that nothing contained in that chapter should affect any rule of Hindu law. As the effect of this was to leave this important question as it stood for the present, and to give an opportunity for its full consideration in future, he had gladly acceded to the proposed

Hindu Wills Act.

Dabee,[1] a question was raised, whether the rule in the *Tagore Case*, that a testamentary gift to a person not in existence at the death of the testator was invalid, could apply to wills of Hindus made since the passing of the Hindu Wills Act. Mr. Justice Wilson held, in the Court of first instance, that the rule was not applicable, and that the case was governed by section 99 of the Succession Act which had been made applicable to Hindus by section 2 of the Hindu Wills Act. It was argued that this would neutralize the provisions of section 3, which lays down that the Act does not authorize the creation of any interest in property which could not have been created before; the learned Judge overruled this contention, holding that the words "create any interest" must refer only to the estate or interest which can be given, without reference to the further question to whom it can be given, as otherwise it would follow that the Legislature had in section 2 enacted an elaborate set of provisions, and, in the very next section abolished them all. This decision, however, was dissented from by Pontifex, J., in *Kally Nath Naug Chowdhry* v. *Chunder Nath Naug Chowdhry*,[2] and was subsequently reversed, on appeal, by Garth, C. J., and White, J., who held that section 3 of the Hindu Wills Act refers not only to the quantity and quality of the interest created, but also to the capacity of the donee to take. It follows, therefore, that sections 99—101 of the Succession Act are not applicable to Hindu Wills, and this was accepted as settled law in a

amendment, though regarding it from a different point of view from that taken by its proposers. For his part, he would sooner repeal the corresponding sections in the Hindu Wills Act, and stick to the rule in the *Tagore Case*, with an exception in favour of bequests to, or settlements on, unborn children of a Hindu daughter, to take effect on the death of the daughter. The difficulties arising from settlements of land in England should make the Council chary of extending the existing powers of settlement in India."

See also the Proceedings of the Imperial Legislative Council when the provisions of the Hindu Wills Bill were considered (Proceedings, Vol. IX, pp. 14, 338).

[1] (1881) I. L. R., 8 Cal., 157. On appeal (1882), I. L. R., 8 Cal., 637.

[2] (1882) I. L. R., 8 Cal., 378.

recent case.[1] If it is permissible to search for the reason of this extraordinary state of things, it may perhaps be traced to the fact that, at the time the Hindu Wills Act was enacted, the *Tagore Case* had not yet been decided by the Privy Council, the extent of the legal powers of devise among Hindus was still a matter of the gravest doubt and dispute, and consequently the Legislature was anxious to provide against the possibility of enacting, through oversight or ignorance, anything which might prove repugnant to Hindu law.[2]

Mahomedan Law.

I purpose to conclude this lecture with a brief reference to the Mahomedan law on this subject. The matter is involved in some obscurity, as many of the most important works on Musulman jurisprudence still lie entombed in their original Arabic, and, the cases which have come before our tribunals for decision have been comparatively few and mostly connected with questions on the validity of endowments. An eminent Mahomedan jurist, however, who had access to all the original authorities, broadly states that the Mahomedan law distinctly recognises perpetuities, and that, so long as commencement is made with a life in being, it is not necessary, in the case of a settlement or devise, that the persons who take the remainder should be in existence.[3] The same learned author further maintains that the original texts of the Mahomedan law unquestionably support the creation of perpetual family settlements under the veil of religious trusts. The Judicial Committee, however,

[1] *Ram Lal Sett* v. *Kanai Lal Sett* (1886), I. L. R., 12 Cal., 663 (669), where Wilson, J., says: "It seems to be settled that by reason of the saving clause in the Hindu Wills Act, neither sec. 100 nor sec. 101 of the Succession Act, though embodied in the Hindu Wills Act, has any application to Hindu Wills; and it would seem to follow that sec. 102 has none either." *See* also *Jairam* v. *Kuverbai* (1885), I. L. R., 9 Bom., 491; *Anandrao* v. *A. G., Bombay* (1895), I. L. R., 20 Bom., 450.

[2] *See* the caustic but by no means unjust criticism of Pontifex, J., in I. L. R., 8 Cal., 390.

[3] 1 Amir Ali, Mah. Law, 534. *See* also p. 139, where the lawfulness of limited estates under the Shiah law is discussed.

Decision of the Privy Council.

in a recent case,[1] declined to accept this proposition on the ground that it is based upon an absolute and extravagant application of abstract precepts taken from the mouth of the Prophet. It is extremely doubtful, therefore, how far our Courts would support a disposition by a Mahomedan, which tended to create a perpetuity; for you will remember that, although the technical details of the English system might not apply, yet it has been held that perpetuities, as they make property inalienable, are opposed to public policy, and, must be discouraged, unless they are for objects, which are in some way useful or beneficial to the community.[2]

[1] *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (1894), L. R., 22 I. A., 76.

[2] See *Renaud* v. *Tourangean* (1867), L. R., 2 P. C., 4; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R., 6 P. C., 381.

LECTURE IV.

The Rule against Perpetuities—its Scope and Corollaries.

In the present lecture, we purpose to examine the scope and corollaries of the rule against perpetuities. Enunciation of the rule in English law.

The rule as settled in English law, may be stated thus :

"No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest,"

or, as Sir George Jessel put it in a recent case,

"Property cannot be tied up longer than for a life in being and twenty-one years after. That is called the rule against Perpetuities."[1]

The rule laid down in the Indian Succession Act is as follows : The Succession Act.

"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the

[1] *In re Ridley* (1879), 11 Ch. D., 645 (649), 48 L. J. Ch., 563.

The rule as applicable to executory devises was thus stated by Cresswell, J., in *Dungannon* v. *Smith* (1846), 12 Cl. & F., 526 (563): "An executory devise to be valid must be so framed that the estate devised must vest, if at all, within a life or lives in being and twenty-one years after." Lord Kenyon stated it in similar terms with reference to personal property in *Jee* v. *Audley* (1787), 1 Cox., 324; 1 R. R., 46: "The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and, twenty-one years, and nine or ten months afterwards."

expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."[1]

Vested interests.

You will observe, in the first place, that the rule has no application to vested interests; when an interest has once vested, it cannot be bad for remoteness.[2] This is not the place to enter upon an elaborate exposition of the incidents of vested and contingent estates, but the fundamental point of distinction between the two, may be made clear without much difficulty. You will remember that by the law of England, a landowner may, at the same moment and by the same grant, limit or carve out of his estate in the land, as many smaller estates to take effect in succession, as would make up the whole estate he has in the land. Thus, *X* who has an estate in fee, might grant his land to *A* for life, upon *A's* death to *B* and the heirs of his body, and upon failure of the heirs of *B's* body to *C* in fee. By this ultimate grant, *X* would of course exhaust the whole estate he had. *A* would then have an estate for life in possession, *B* an estate tail in remainder, *C* an estate in fee in remainder; this "remainder" is not necessarily the whole remaining estate of the donor, but it is an estate subsequent to an estate in possession. If no remainder in fee had been granted to *C*, a portion of the estate of *X*, namely, an estate in fee less an estate for life followed by an estate tail, would not be disposed of by the grant, and *X* would, therefore, retain an estate in fee in reversion. Estates in remainder are of two kinds, vested and contingent. A

Vested remainder.

vested remainder is one which the person to whom the estate is limited in remainder, is ready to take should the estate previous to his remainder determine at any moment.

Contingent remainder.

A contingent remainder is one which the person designated to take in remainder, is not ready to take, should the preceding estates determine any moment. Thus, if a grant is made to *A* for life, remainder in fee to a living person *B*, *A* takes an estate in possession, and *B* a vested remain-

[1] Act X of 1865, sec. 101.

[2] *Turney* v. *Turney* (1899), 2 Ch., 739.

der in fee, for *B* is ready to enter on the estate at that very moment. But if the grant is to *A* for life, remainder in fee to the eldest son of *B*, *B* being then unmarried, whether the remainder will ever take effect is contingent on *B's* having a son before *A* dies; as soon as that son is born, however, his estate ceases to be contingent on his birth before the death of *A*, and he becomes entitled to a vested remainder. The characteristic, therefore, which distinguishes a vested from a contingent remainder is its present capacity to take effect in possession if the prior estates are determined at once; in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainder-man is the existence of the preceding estates, that is to say, a remainder is vested if it is subject to no condition precedent but the termination of the preceding estates.

Distinction between vested and contingent remainders.

To apply these principles to a concrete case, suppose the devise to be to *A* in fee, but if she dies unmarried, to *B* and the heirs of her body, and, on failure of them to *C* and the heirs of her body. Here the interest of *C*, though executory at the death of the testator, would be turned into a vested remainder by the death of *A* unmarried; that is to say, if it is to take effect at all, it will become vested within the time limited by the rule, and, is, therefore, not too remote.[1] But although an

Illustrations.

[1] See *In re Roberts* (1881), 19 Ch. D., 520, (530), where the principle is substantially laid down by Jessel, M. R.

In order to ascertain where an interest is intended to vest, we may sometimes have to decide difficult questions of construction; but once the meaning has been ascertained, there ought not to be any difficulty in the application of the rule. Thus in *Lett* v. *Randall* (1855, 3 Sm. & G., 83; 24 L. J. Ch., 708) a testator by his will gave the residue of his estate to his children for their lives, and declared that if any daughter should die, leaving a husband, her share should be paid to him for his life, and after his death should be divided in equal shares among the children of such daughter then living; it was held that the interests of the children were not intended to vest at the death of the daughter, and, as the daughter might marry a person who was unborn at the testator's death, the gift to the children was void for remoteness. This case may

Illustrations.

estate which, though now a contingent remainder or executory devise, is good if it becomes a vested interest within the period allowed by the rule, care must be taken that it does actually so vest, for the mere fact that it will vest during or at the end of a life-interest which is itself good, does not make it valid.[1] Similarly, under the English Law, there may be gifts for life to persons unborn in succession, provided their estates must vest within the required limits.[2]

be distinguished, from *Goodier* v. *Johnson* (1881, 18 Ch. D., 441; 51 L. J. Ch., 369), where the children were held entitled to vested interests without reference to their surviving the period of distribution. The case of *Cooke* v. *Bowler* (1836, 2 Keen, 54; 5 L. J. Ch., 250), has sometimes been erroneously thought to be an authority for the position that a vested interest must be too remote if preceded by a life-estate to an unborn person; there the testator gave a fund to his four brothers and sisters for life, with remainder to their children for life with benefit of survivorship, and, on the death of the survivor, to be distributed in accordance with the Statute of Distributions; Lord Langdale held the direction for distribution void for remoteness, and that would be so, for if the persons to take under the statute were not to be ascertained till the life-estates determined, the gift to them was contingent and remote; on the other hand, if the interest is held to have vested at the death of the testator, the next of kin then alive would be entitled to take—and, they in fact were the persons who did take.

Again in *Ashley* v. *Ashley* (1833, 6 Sim., 358), the testator devised an estate to *A* for life, remainder to all the children of *A* as tenants in common and not as joint-tenants for life and for want of such issue, remainder over; Shadwell, V.C., held that cross-remainders for life to the children of *A* should be implied. The validity of this assumption has been doubted by Stuart, V. C., in *Stuart* v. *Cockerell* (1869), L. R., 7 Eq., 366 (370), on the ground that such cross-remainders would be bad for remoteness, but it was apparently overlooked that the cross-remainders all vested on the death of *A*. The case is not similar if there is a gift to the children of *A* as tenants in common for life, remainder to the survivor in fee, for in such a case the remainder is contingent until all the tenants but one are dead.

[1] *In re Merrick's Trusts* (1866), L. R., 1 Eq., 551 (557), where Wood, V.C., said: "The principle upon which the Court proceeds is to vest the estate as early as possible. The anxiety of this Court, at all times, has been to take care that the estate shall vest at as early a period as possible; and, therefore, the Court has said, when it finds certain life-estates interposed, that those life-estates are not to postpone the vesting of interests under the limitations in favour of the persons who will take subject to those life-interests."

[2] See *Stuart* v. *Cockerell* (1869), L. R., 7 Eq., 363, where Malins, V.C., said: "Property may be given by will or secured by settlement,

From what has been stated, it follows that once a remainder is vested, that is, once it is ready to take effect whenever and however the particular estate determines, it does not matter that the particular estate is determined by a contingency which may fall beyond a life or lives in being. Thus, suppose the devise to be to the unborn child of *A* until he dies or changes his name, and, then to *B* and his heirs; here *B* has a vested remainder as he will take the estate whether the child dies or changes his name, and, hence it is immaterial that the contingent determination of the estate before the death of the child may take place beyond the limits prescribed by the rule.[1]

Before you apply the principles we have been discussing, to any case under the Indian Succession Act, you must not overlook the provisions of sections 99, 100 and 101 of that Act, which have an important bearing on the subject. Indian Succession Act, sec. 99.

"**99.** Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Bequest to a person by a particular description, who is not in existence at the testator's death.

to an unborn person for life, or to several unborn persons sucessively for life, with remainders over, provided the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons." *See* also *Brudenell* v. *Brooks* (1801), 1 East., 442; 7 Ves., 381; 6 R. R., 310, where Lord Kenyon, C. J., laid down that an unborn child may be made tenant in tail, but not tenant for life, with a limitation to his children as purchasers. *See* also *Cadell* v. *Palmer*, 1 Cl. and F. 372.

[1] *In re Roberts* (1881), 19 Ch. D., 520. It makes no difference whether the provision for determination of the estate is expressed in the form of a condition or a limitation. Similarly, a remainder to a person ascertained and his heirs after a term for years, however long the term, or whatever be the conditions to which the term is subject is not too remote. Thus in *Wood* v. *Drew* (1864), 33 Beav., 610, where a testator had bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children, and had further directed that after the expiration of any of the leases, his trustees should convey to his daughter and her children, one or more of his five freehold houses of equal annual value to the expired leasehold, it was held by Romilly, M. R., that the devise was not invalid either for remoteness or uncertainty. *See* also *Gore* v. *Gore* (1722), 2 P. Wms., 28.

Indian Succession Act, sec. 99.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise ; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or if he be dead, to his representatives.

Illustrations.

(*a*) *A* bequeaths 1,000 rupees to the eldest son of *B*. At the death of the testator *B* has no son. The bequest is void.

(*b*) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son. Afterwards, during the life of *B*, a son is born to *C*. Upon *B's* death, the legacy goes to *C's* son.

(*c*.) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son ; afterwards, during the life of *B*, a son, named *D*, is born to *C*. *D* dies, then *B* dies. The legacy goes to the representative of *D*.

(*d*.) *A* bequeaths his estate of Greenacre to *B* for life, and at his decease to the eldest son of *C*. Up to the death of *B*, *C* has had no son. The bequest to *C's* eldest son is void.

(*e*.) *A* bequeaths 1,000 rupees to the eldest son of *C*, to be paid to him after the death of *B*. At the death of the testator, *C* has no son, but a son is afterwards born to him during the life of *B* and is alive at *B's* death. *C's* son is entitled to the 1,000 rupees."

Bequest to a person not in existence at the testator's death, subject to a prior bequest.

"**100.** Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations.

(*a*.) Property is bequeathed to *A* for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, *A* has no son. Here the bequest to *A's* eldest son is a bequest to a person not

in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to *A's* eldest son for his life is void. Indian Succession Act, sec. 100.

(*b.*) A fund is bequeathed to *A* for his life, and after his death to his daughters. *A* survives the testator. *A* has daughters some of whom were not in existence at the testator's death. The bequest to *A's* daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to *A's* daughters is valid.

(*c.*) A fund is bequeathed to *A* for his life, and after his death to his daughters, with a direction that if any of them marries under the age of 18, her portion shall be settled so that it may belong to herself for life, and may be divisible among her children after her death. *A* has no daughters living at the time of the testator's death, but has daughters born afterwards, who survive him. Here the direction for a settlement has the effect, in the case of each daughter who marries under 18, of substituting for the absolute bequest to her a bequest to her merely for her life,—that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed The direction to settle the fund is void.

(*d.*) *A* bequeaths a sum of money to *B* for life, and directs that, upon the death of *B*, the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. *B* has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of *B* is contained in the direction to settle the fund, and this direction amounts to a bequest, to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of *B* is void."

"**101.** No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity.

Illustrations.

Indian Succession Act, sec. 101.

(*a.*) A fund is bequeathed to *A* for his life; and after his death to *B* for his life; and after *B's* death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B*, who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B*, and the minority of the sons of *B*. The bequest after *B's* death is void.

(*b.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death to such of *B's* sons as shall first attain the age of 25. *B* dies in the lifetime of the testator leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(*c.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life; with a direction that, after *B's* death, it shall be divided amongst such of *B's* children as shall attain the age of 18; but that if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(*d.*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid.

The next principle in connection with the rule against perpetuities to which I ought to draw your attention is, that the contingencies *must* happen, if at all, within the limits laid down in the rule; it is not sufficient that the interest created *may* vest within that period; unless it is created in such terms that it cannot vest after that period, it is not valid, and, subsequent events cannot make it so; in other words, it

is not enough that a contingent event may happen, or even that it will probably happen within the prescribed limits; if it can possibly happen beyond those limits, an interest conditioned on it, is too remote.[1] But, as pointed out by Mr. Baron Parke,[2] it is a mistake to suppose that the rule requires that the absolute interest given by the limitation should actually take effect within that period; it is not difficult to conceive a case in which that would not necessarily happen, and yet the bequest may be good; for example, a bequest to the first person who would climb up the cross of St. Paul's within twenty-one years from the testator's death, would certainly be good under the English law, though it was wholly uncertain whether it would ever take effect; but a devise to the first person, who should do so, without any limit of time, would be bad; in the first case, the devise would necessarily take effect within the limit, if it took effect at all; in the second it would not.[3] What the rule really requires is, as was explained by Lord Chief Justice Tindal,[4] *first*, that the executory trust or limitation not only may, but necessarily must take effect, if it takes effect at all, within the prescribed period, and, *secondly*, that if at the time of its creation, the limitation is so framed as not, *ex necessitate*, to take effect within the prescribed period, that is, if the limitation is bad in its inception, it will not become valid by reason of the happening of subsequent events which bring the time of its actual vesting and taking effect within the period prescribed by law. To take a well-known illustration, suppose the devise to be to *A*, a bachelor, for life, remainder to his widow for life, remainder to other persons to be then ascertained; here, the remainder over on the death of the widow is bad, because *A* may marry a woman who was not born at the testator's death, and it is immaterial that *A* is very old at

Interest must vest within the prescribed limits.

Rule summarised by Tindal, C. J.

Illustration.

[1] *Dungannon* v. *Smith* (1845), 12 Cl. & F., 546; *Jee* v. *Audley* (1787), 1 Cox, 324, 1 R. R., 46.

[2] 12 Cl. & F., 600; with reference to this, *see* the observations of Lord Brougham at p. 630.

[3] 12 Cl. & F., 600.

[4] 12 Cl. & F., 613.

Possibility of a woman being past child bearing.

the testator's death.[1] Indeed, the rule is so stringently applied that the possibility of a woman being past child bearing, has been held to be not a possible event for the purpose of determining whether a gift is void for remoteness or not; thus, a devise to those of a woman's children who reach the age of twenty-five, is bad, although at the death of the testator the woman is of such an age that it is certain that she can have no more children and the contingency must happen during the lives of persons in existence at the death of the testator.[2] The principle we have explained has been held applicable to Hindu Wills, as founded on reason and convenience,

[1] *Hodson* v. *Ball* (1845), 14 Sim., 558; *Lett* v. *Randall* (1855), 3 Sm. & Gif., 83; 24 L. J. Ch., 708; *Buchanan* v. *Harrison* (1861), 1 J. & H., 662; *In re Merrick's Trusts* (1866), L. R., 1 Eq., 551; *Goodier* v. *Johnson* (1881), 18 Ch. D., 441; 51 L. J. Ch. 369.

[2] *Jee* v. *Audley* (1787), 1 Cox, 324, 1 R. R., 46, per *Sir Lloyd Kenyon*, M. R., and the observations thereon by Lord Brougham in *Dungannon* v. *Smith* (1845), 12 Cl. & F., 546 (631); *In re Sayer's Trusts* (1868), L. R., 6 Eq., 319, where Malins, V.C., held that evidence was not admissible to prove that a married woman was past the age of child bearing at the date of the will for the purpose of showing that children then living were meant, so as to validate the gift over which was otherwise void for remoteness. The later decision of Malins, V.C., in *Cooper* v. *Laroche* (1881), 17 Ch. D., 368, where he treated a future gift to the children of a woman sixty years old as a gift to persons in esse, cannot be supported and has not been followed. *In re Dawson* (1888), 39 Ch. D., 155. *See* also *Smith* v. *Smith* (1870), L. R., 5 Ch. Ap., 342; *In re Bevan's Trust* (1887), 34 Ch. D., 716. The class of cases just referred to must be distinguished from another class to be found in the books, of which *Edwards* v. *Tuck* (1856), 23 Beav., 268, may be taken as the type. It sometimes happens that *A* has an absolute interest in personalty subject to the contingency of there being children of herself and some other person; in such a case the Court does not ordinarily give the custody of the fund to *A*, but when by reason of her age or of the age of the other person, there is no chance that there will ever be such children, the Court may order the fund to be paid to *A* on her giving security to turn it over to the children, if born. The question, of course, in such a case is not one of title but of custody and management. In addition to the earlier cases mentioned in the note in 23 Beav., 272, reference may be made to *Dodd* v. *Wake* (1852), 5 DeG. & Sm., 226; *In re Widow's Trus* (1871), L. R., 11 Eq., 408; *In r Milner's Estate* (1872), L. R., 14 Eq., 245.

and not on any peculiarities of the strict English Common Law.[1]

Contingency postponed for number of lives.

The next point to which it is desirable to draw your attention is that under the English law, the contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created, and it is not necessary that these persons should have any interest in the estate. The provisions of the Indian statutes on the subject are quite clear, but the point was not settled in England without much earnest discussion. In the celebrated case of *Thellusson* v. *Woodford*[2] the testator directed that the income of his property should be accumulated during the lives of all of his sons, grandsons, and their children who were alive at his death, and that upon their death, the property with its accumulations should be divided into three lots, each lot to go to the eldest male lineal descendant of one of his sons respectively. The House of Lords, in accordance with the unanimous opinion of the Judges, upheld the validity of the devise ; Lord Chief Baron Macdonald, who delivered the opinion of the Judges, said : "The number of co-existing lives is a matter of no moment ; in fact, the life of the survivor of many persons named or described, is but the life of some one." Referring to the contention that the persons during whose lives the suspension was to continue, should be persons immediately

[1] See *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (1877), I. L. R., 2 Cal., 262 (268), where Pontifex, J., said : "In deciding questions of remoteness it is an invariable principle of the English Courts to pay regard to possible and not to actual events ; and the fact that a gift *might* include objects too remote or incapable of profiting directly by the testator's bounty, is held fatal to its validity." *See* also *Bramamayi Dasi* v. *Jogeshchandra Dutt* (1871), 8 B, L, R., 400 (407), where Norman, C. J., said : "It is clear that the event on which this gift over is to take effect *may* be very remote. A son *might* be born to one of the testator's sons forty years after the death of the testator. The death of such a son's son at the age of twenty years, *might* constitute the event. During all that time, it would be utterly uncertain who would be the person to take on the happening of the event."

[2] (1805), 4 Ves., 227; 11 Ves., 112; 8 R. R., 104.

Thellusson v. Woodford.

connected with or immediately leading to the person in whom the property was first to vest when the suspension should be at an end, His Lordship said : "I am unable to find any authority for considering this as a *sine quâ non* in the creation of a good executory trust. When the true reason for circumscribing the period during which alienation may be suspended, is adverted to, there seems to be no ground or principle that renders such an ingredient necessary. The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not ; nor, whether the lives are those of persons immediately connected with or immediately leading to that person, in whom the property is to vest, terms to which it is difficult to annex any precise meaning. The policy of the law, which, I apprehend, looks merely to duration of time, can in no way be affected by those circumstances." It is manifest that the rule laid down here, which is practically identical with the rule laid down in the Indian Succession Act, may, in the hands of erratic testators, give rise to great practical difficulty ; for instance, imagine a devise which postpones the vesting during the lives of all the persons now alive in India or in the whole world ; clearly, it would be impracticable to ascertain the period when the gift would vest. The point was vigorously pressed by counsel in the case just referred to, and, in answer it was said : "When it is asserted that the rule permits the vesting to be postponed during as many lives as can be stated, it must be asserted with this qualification, namely, that they are not more than will admit of making out, by reasonable evidence, at what time the survivor ceases to exist. Property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied to determine when the survivor of them drops."[1] Similarly, in the

[1] *Per* Lord Eldon, C., 11 Ves., 146.

subsequent case of *Cadell* v. *Palmer*,[1] the House of Lords affirmed the validity of a limitation by way of executory devise to take effect upon the death of the survivor of twenty-eight persons, who were living at the death of the testator and of whom seven only were to take interests under the devise. The rule appears, therefore, to be too firmly established to be questioned, and, should any cases of practical difficulty occur, such cases will, no doubt, be put to the usual test whether they will or will not tend to a perpetuity, by rendering it almost, if not quite impracticable, to ascertain the extinction of the lives described, and will be avoided or supported accordingly.[2] *Cadell* v. *Palmer*.

The next point which I would ask you to note is that a child in the womb of its mother is, for the purposes of the rule, considered as in existence. Whatever may have been the law in early times, it is a rule

[1] (1832) 1 Cl. & F., 372.

[2] *See* also *Pownall* v. *Graham* (1863), 33 Beav., 242; 9 Jur. N. S., 318, where a testator gave his estate in trust for his seven brothers for life, and, on the death of the survivor, to apply the income for the benefit of their children "as the law in such cases admits," and "after the law admits of no further division," to hold the fund in trust for the eldest son of *A*; Lord Romilly, M.R., held that the trust for the brother's children came to an end twenty-one years after the death of the survivor of the brothers, and observed: "The law would admit this trust for division amongst the children to go on as long as any person living at the moment of the testator's death was in existence, and during twenty-one years after the life of the longest liver of any person then in existence. But it would be impossible to ascertain when that period would cease, and, if it were, all the children of his brother would probably be then dead, and the gift over would fail of taking effect. I am of opinion, therefore, that it is impossible so to construe it, and that the period from which the twenty-one years must begin to be calculated is the death of the last surviving brother. In no other way can effect be given to this trust, for the testator might have directed it to endure so long as any of the children in a charity school should live and twenty-one years after, but unless he so expressed it, it could not be maintained, as it would be impossible for the trustees to ascertain when the trust ceased. The general scope and object of the will itself gives the explanation. No one contends that the trust is to go on until the death of everybody in existence at the testator's death, and both parties have referred to the will as being the guide from which the period from which the twenty-one years is to begin to run, is to be ascertained."

Status of child in womb.

generally adopted in mature systems of jurisprudence that a child in embryo is to be considered as born, when it will be for its benefit so to be considered. It is hardly necessary to remind you that the question is not free from metaphysical difficulties whatever view you may accept on the subject. I have already drawn your attention to the favoured position which a child in embryo occupies under the Hindu law in respect of succession and partition. In the Roman law, also, existence was for certain purposes assumed to begin before birth.[1] Similarly, under the English law, as Sir W. Blackstone[2] puts it, "an infant in *ventre sa mere* is supposed to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have an estate assigned to it, and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." The Judicial Committee have held that a similar

[1] Thus, although upon the authority of Ulpian (Dig., 25, 4, 1, 1): "The fruit of the body before it is born is part of the mother or the womb," and natural capacity for rights begins with the birth of men, that is, the complete separation of a living human being from the mother, Paul points out the ways in which the embryo in the mother's womb is recognized by law:

"Attention is bestowed upon that which is in the womb, just the same as if it had come to life, whenever a question arises as to the embryo's own privileges, although in no way benefiting another before it is born." Dig., 1, 5, 7.

"Our speaking of him whose birth is anticipated as though he were in existence, is correct when the question is as to his own right." Dig., 50, 16, 231.

"The ancients paid regard to the child in the womb in such way that they maintained all rights in its favour intact until the time of birth, as may be seen in the law of inheritance." Dig., 5, 4, 3.

See Markby, § 132; Holland, p. 83; Sohm. (Ledlie), § 20; Savigny, System, § 62; Mackeldy (Dropsie), § 669; Salkowski (Whitfield), § 32; Goudsmit (Gould), § 21; Thibaut (Lindley), § 103, and a valuable note thereon in the Appendix by the learned translator. Reference may also be made to an article in 26 Am. Law Rev., 1892, p. 50, where the reader will find a learned discussion on the question of the liability of a carrier of passengers for injury to unborn child, in connection with a recent Irish case, *Walker* v. *G. N. R. Company*, 28 L. R., Ir., 69.

[2] 1 Com., 130. *See* also *Clarke* v. *Clarke* (1795), 2 H. Bl., 399.

rule is applicable in this country.[1] But such a child, though treated as born when it is for its benefit to be so considered, is not ordinarily regarded as born for the benefit of third persons;[2] in cases of application of the doctrine to questions of remoteness under the English law, the principle, however, receives an extension in so far as a child in the womb is considered to be a life in being even for the benefit of strangers; this, indeed, is a necessary consequence of the principle that the lives in being (including, as we now see, a child in the womb) upon the expiry of which the interest may vest under the rule of English law, need not in any way be connected with the ultimate taker of the estate. We have, therefore, in reality two rules, first, that every life is to be considered as beginning from the time of conception, and secondly, that a future interest, to begin when or before a person reaches twenty-one (under the English law) or eighteen (under the Indian Succession Act)[3] is not

Benefit of third persons.

[1] In *Tagore* v. *Tagore* (1872), L. R., I. A., Sup. Vol. 47 (67), after pointing out that in the case of gifts under the Hindu law, there must be relinquishment by the donor in favour of the donee who is a sentient person, Mr. Justice Willes adds: "By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence."

[2] *See* Savigny, System, § 62 (tr. Rattigan, p. 9; tr. Guenoux, II, p. 13), where he says: "This fiction is universally restricted for the benefit of the child, and no one else ought to be permitted to employ it for his own purposes."

See also Voet. Com., Book I, Tit. V. § 5 (tr. Buchanan, p. 108), where it is pointed out that although those in the womb are considered as born, whenever it is for their advantage, this fiction of law ceases, if the advantage be not to those in the womb, but to third persons.

See further the judgment of Lord Chancellor Westbury in *Blasson* v. *Blasson* (1864), 2 DeG. J. & S., 665; 34 L. J. Ch., 18, where it was said "that the fiction or indulgence of the law, which treats the unborn child as actually born, applies only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to, and that it is limited to cases where *de commodis ipsius partus quæritur*."

Lord Chancellor Hardwicke, however, in *Wallis* v. *Hodson* (1740), 2 Atk., 117, while noticing that the Civil Law confined the rule to cases in which it was for the benefit of the child to be considered as born, stated broadly the rule to be that such child was to be considered living to all intents and purposes.

[3] *See* sec. 3.

Period of gestation.

too remote, if such person must be begotten, though not born, within a life in being at the creation of the interest. You must not forget, however, that allowance is made for gestation only in cases in which gestation actually exists, that is to say, you cannot, unlike the period of twenty-one years, count the number of months equal to the ordinary or longest period of gestation, as a term in gross.[1]

Two or three periods of gestation may be allowed.

I ought to point out to you that cases are conceivable in which two or even three periods of gestation may have to be allowed. For instance, assume the devise to be to the children of the testator for life, upon their death to their children, but should such children all die minors, then to *A* and his heirs. The bequest in favour of *A* is good under the English law, though the testator may leave a posthumous child, and such child again may leave a posthumous child; and, the period of gestation is allowed, in each instance, for the benefit of a stranger.[2] In some cases, a third period of gestation may have to be taken into account, but although the question was raised in *Smith* v. *Farr*, which came before Lord Abinger, C.B., in 1839, it was left undecided.[3] Assume the devise to be to the children of the testator for their lives, with direction for accumulation upon their death till the youngest grandchild reaches twenty-one, and then to be divided among the grandchildren then living and the issue then

Smith v. *Farr*.

[1] *Cadell* v. *Palmer* (1832), 1 Cl. & F., 372 (421).

[2] The case of *Long* v. *Blackall* (1797), 7 T. R., 100, is usually referred to as authority for the position that two periods of gestation may be allowed. No question of a double period of gestation, however, arose in that case, and what was actually decided was that the period of contingency may *begin* with the life of a person in the womb. *See* 2 Hargrave Jurid. Arg., 105; *see* also *Thellusson* v. *Woodford* (1805), 11 Ves., 112 (143); 8 R. R., 104 (114), where Lord Chief Baron Macdonald said: "What should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity."

[3] 3 Y. & C., 328; 8 L. J. Ex. Eq., 46.

living of any deceased grandchild. Now, it is quite conceivable that one of the children of the testator, *A*, may be posthumous, and such child may die leaving his son *X*, and another son *Y ventre sa mere;* again, *X* may die leaving his wife *enciente*, at such time that the posthumous son of *X* may be born after *Y* reaches twenty-one. Here we have clearly five periods, covering a life in being, a period of twenty-one years and three periods of gestation, namely, we have (1) the period between the death of the testator and the birth of *A*, (2) the life of *A*, (3) the period between the death of *A* and the birth of *Y*, (4) period till *Y* attains twenty-one, (5) period between the date when *Y* attains twenty-one and the posthumous son of *X* is born. There does not seem to be any reason why the bequest to the issue of the deceased grandchild should fail.[1]

Distinction between English and Indian rules.

It is impossible you could have failed to notice the most striking point of difference between the English and Indian rules on the subject, namely, that whereas under the English law the additional period allowed after lives in being is a term of twenty-one years in gross without reference to the infancy of any person, under the Indian statutes, the term is the period of minority of the person to whom, if he attains full age, the thing bequeathed is to belong. It is not necessary for me to deal with this matter at any very great length here, as I have already pointed out to you in the second lecture that the decision of the House of Lords in *Cadell* v. *Palmer*,[2] which settled the law in England, was based not so much upon principle,

[1] Lewis in his work on Perpetuities (p. 726) took this view, but in his supplement (p. 22) doubted the correctness of this conclusion, on the ground that, so far as the grandchildren were concerned, the period of gestation of the great-grandchildren was a term in gross, and, so far as the great-grandchildren were concerned, the period of gestation of the grandchildren was a term in gross. But, as Prof. Gray acutely points out, this seems immaterial, the period of gestation, though allowed only when it actually exists, is allowed even for the benefit of persons other than the child in the womb (Gray, 157). Contrast the provisions of the Indian Succession Act under which the additional period allowed after lives in being is not only dependent on minority, but is allowed only for the benefit of the infant who takes.

[2] 1 Cl. & F., 372.

as upon the earlier decisions on the subject. Indeed, Lord Brougham himself who delivered the opinion in *Cadell* v. *Palmer*, in the House of Lords, subsequently pointed out in more than one case[1] that the decision in that case sanctioned an extension of the rule against perpetuities which was illogical and could not be justified on principle.[2]

Period from which time allowed by rule runs.

The next principle to which I desire to draw your attention is that the period from which the time allowed by the rule begins to run, is calculated, when the limitations are created by deed from its date, and when by will from the death of the testator. Indeed, it is surprising that anybody could ever have supposed that the question of remoteness was to be determined with reference to the state of things at the date of the will and not at the death of the testator. I need hardly point out that the two views may lead to very different results; for example, take the devise to be to those children of *A*, a living person who attains the age of twenty-five. If the testator dies before *A*, the bequest is bad for remoteness, as *A* may have a child born after the death of the testator; on the other hand, if *A* dies before the testator, and the period is taken to run from the death of the testator, the bequest is good, as it must take effect if at all, during the lives of the children of *A*, none of whom can be non-existent at the death of the testator.[3] The rule, as I have

[1] Thus in *Tollemache* v. *Coventry* (1834), 2 Cl. & F., 611 (624), Lord Brougham said with reference to the principle laid down in *Cadell* v. *Palmer*, that it was "a principle undoubtedly repugnant to the original grounds of the rule, but adopted in conformity with decisions of an old date and with the general understanding and practice of the profession." *See* also *Phipps* v. *Ackers* (1842), 9 Cl. & F., 583 (598); *Dungannon* v. *Smith* (1846), 12 Cl. & F., 546 (629); and *Cole* v. *Sewell* (1848), 2 H. L. C., 186 (233), where it is said that the extension was due to a mistake which had crept in by degrees. *See* pp. 41, 76, *ante*.

[2] The English rule, however, appears to have been adopted in America. *See* Stimson, American Statute Law, Vol. I, p. 179.

[3] It must not be forgotten that under the English law, although property is limited so as not to vest until after the expiration of twenty-one years, it will not be void on account of remoteness, if the limitation be to persons living at the testator's death, for the vesting will be within the period of a life in being. See *Lachlan* v. *Reynolds* (1852), 9 Hare, 796.

stated it, is now well-settled and amply supported by authority.[1]

I have already pointed out to you that an interest is not bad for remoteness, if it begins within the limits laid down in the rule; it is hardly necessary to point out that it need not also terminate within the same limits. There are, however, dicta of two eminent Judges and an express decision in which the contrary opinion was maintained.[2] This, however, can no longer be regarded as good law, and it must be taken to be settled under the English law that an estate can be limited to an unborn person for life, whether there be a gift over or not, and Sir George Jessel, M. R., upon a review of all the authorities on the subject, said in a recent case :[3] "It never was

Interest need not terminate within limits of rule.

[1] *See* for instance *Soudamineé Dossee* v. *Jogesh Chunder Dutt* (1877), I. L. R., 2 Cal., 262 (268), where Pontifex, J., said : "The question (of remoteness) is to be considered according to the state of circumstances at the period of the testator's death, and not merely according to the state of circumstances at the date of the will." *Dungannon* v. *Smith* (1846), 12 Cl. & F., 546 (574); *Cattlin* v. *Brown* (1853), 11 Hare, 372 (382); *Vanderplank* v. *King* (1843), 3 Hare, 1; *Hale* v. *Hale* (1876), 3 Ch. D., 643, where Jessel, M. R., says: "The doctrine on the subject is perfectly well settled. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within 21 years from the termination of any life then in being." See *In re Dawson* (1883), 39 Ch. D., 155; *Tregonwell* v. *Sydenham* (1814-15), 3 Dow., 194 (215); *Ibbetson* v. *Ibbetson* (1840), 10 Sim., 515; *Faulkner* v. *Daniel* (1843), 3 Hare 216; *Williams* v. *Teale* (1847), 6 Hare, 251; *Peard* v. *Kekewich* (1852), 15 Beav., 173; *Southern* v. *Wollaston* (1852), 16 Beav., 166, 276; *Monypenny* v. *Dering* (1852), 2 DeG. M. & G. 145. *See* also *Harris* v. *Davis* (1844), 1 Coll., 416; *Andrew* v. *Andrew* (1845), 1 Coll., 690; *In re Rye* (1852), 10 Hare, 112; *Gee* v. *Liddell* (1866), 2 Eq., 341; 35 Beav., 631.

[2] Buller, J., in *Robinson* v. *Hardcastle* (1788), 2 T. R., 241; Sir John Leach, V.C., in *Deerhurst* v. *St. Albans* (1820), 5 Mad., 232; *Hayes* v. *Hayes* (1828), 4 Russ., 311.

[3] *Hampton* v. *Holman* (1877), 5 Ch. D., 183. *See* also *Williams* v. *Teale*, 6 Hare, 239; 1 Jarman, 243. Cf. *Cattlin* v. *Brown* (1853), 11 Hare, 372 (375); *Gooch* v. *Gooch* (1851), 14 Beav., 565; *Evans* v. *Walker* (1876), 3 Ch. D., 211; *Re Roberts* (1881), 19 Ch. D., 520.

It is obvious that as an estate for life is good if it begins within the required limits; so a term for years beginning within those limits is likewise valid. For instance, a devise for a term for twenty-five years to begin on the death of a person living at the death of the testator is good,

Life interest in favour of an unborn person.

law that the remainder must vest in interest at the same time. You might always give a life interest to an unborn person being a child of a person in being, and, it did not matter what the gift over was after the death of such unborn child; it did not affect his interest." It seems to me that the statement that a life interest in favour of an unborn person is bad as tending to a perpetuity, is based on a confusion of ideas; it is one thing to say that property cannot be made inalienable, and a quite different thing to say that future interests cannot be created to vest beyond the limits fixed by the rule against perpetuities, and a bequest may be perfectly good according to one principle and bad according to the other; to be operative, however, it must satisfy both the rules, which, though distinct, jointly operate to prevent the tying up of estates. I need add only that when there is a good absolute gift and the settlor or testator goes on in an additional clause to modify the gift, and by modifying it makes it in part too remote, the modification is entirely rejected, and the original gift stands. This, however, we shall discuss in detail later on.

Limitation of a present life estate.

A question of some nicety has been raised in England whether any limitation of a present life estate or of a present term of not more than twenty-one years, can be void for remoteness; the same question, of course, may be raised in this country, at any rate, in respect of the validity of the limitation of a life estate. The answer seems obvious that such a limitation cannot be bad, though there may in some cases be an apparent breach of the rule against perpetuities. Consider, for instance, the devise to be of an estate for the life of *A*, to such of the children of *X* as attain twenty-two, and if none of them reach twenty-two, to *Y* and his heirs; here the devise to *Y* must take effect, if at all, within the lifetime of *A*, and should, therefore, be regarded as valid. The only

although followed by a limitation bad for remoteness. See *Read* v. *Gooding* (1856), 21 Beav., 478; 4 DeG. M. & G., 510.

direct authority upon the point I am aware of, is the case of *Low* v. *Burron*,[1] where the testator, being seised of an estate for three lives, devised it to his daughter for life, remainder to her issue male, and remainder to *L*. Lord Chancellor Talbot, in holding the bequest to *L* good, observed: "Here can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives. So, if instead of three, there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good, for in effect, it is only for one life, namely, that which shall happen to be the survivor." Similarly in *Harris* v. *Davis*,[2] where a question arose as to the remoteness of a bequest of leaseholds, Vice-Chancellor Shadwell, in deciding against the validity of the gift, expressly proceeded upon the assumption that the leaseholds had more than twenty-one years to run and were not for lives. In other words, if the bequest is of a leasehold for twenty years to the first son of *A*, a bachelor, who may attain twenty-five, when we hold that the limitation is good, we practically give the same effect to it as if the proviso were added "in case such son of *A* shall attain twenty-five within twenty years from the date of the limitation."[3] It cannot be said, however, that such a proviso can always be implied, for it has been said that the question is rather one of expression than of intention.[4] You will see, therefore, that the matter is not always free from doubt and difficulty, which may, in some instances, be increased by the fact that the lease may be renewable. Consider, for instance, the case of a lease which contains a covenant for perpetual renewal by the lessor; the validity of such a covenant, if the entire control thereof be in the hands of persons who have vested interests

Low v. *Burron*.

Harris v. *Davis*.

[1] (1734), 3 P. Wms., 262. Cf. *Love* v. *Wyndham* (1670), 2 Ch. R., 14; *King* v. *Cotton* (1732), 2 P. Wms., 674 at 676.

[2] (1844), 1 Coll., 416; 9 Jur., O. S., 269.

[3] This possibly explains why in *Kemp* v. *S. E. R. Co.* (1872), L. R., 7 Ch. Ap., 364, no suggestion was made that the rule as to remoteness could in any way affect the case.

[4] *Per* Sir George Jessel, M. R., in *Miles* v. *Harford* (1879), 12 Ch. D., 691 (702).

Renewal of leases.

under the lease, is beyond question.[1] But if the right of renewal is not within the control of those who have vested interests under the lease, and if the interest of the person who has the absolute control, may not vest within the limits prescribed by the rule against perpetuities, it seems to be clear that the limitation to such person is bad.[2] Hence, if the devise be of a life-estate or of a term of years with a covenant for perpetual renewal, to *A* for life, on his death to his (unborn) children and their heirs, but if all such children die under twenty-five, to *C* and his heirs, the devise to *C* is bad.[3]

Nature of contingency.

You may perhaps be surprised that I have not yet directed your attention to a topic which occupies a prominent position in some treatises on the law of perpetuities, I mean the question of the nature of the contingency on which a future interest may be conditioned.[4] Of course, such contingencies are infinite in number and character; but there is one which has occasioned a good deal of controversy, namely, when the contingency is failure of issue. It has been disputed, sometimes very warmly, whether, when a bequest is made contingent upon the failure of *A's* issue, an indefinite failure of *A's* issue or a failure at *A's* death is intended. You will see that the question of construction may be of the greatest

[1] See *Hare* v. *Burges* (1857), 4 K. & J., 45; 27 L. J. Ch., 86; *Meller* v. *Stanley* (1864), 2 DeG. J. & S., 182.

[2] In *London and S. W. R. Co.* v. *Gomm* (1882), 20 Ch. D., 562 (579), there is an observation by Sir George Jessel, M. R., that the rule recognising the validity of a covenant to renew a lease at the end of forty or fifty years, as also of a covenant to grant a renewed lease containing a similar covenant for renewal, is an exception to the rule against perpetuities. But this seems hardly necessary, for, as pointed out by the Master of the Rolls himself in *Moore* v. *Clench* (1875), 1 Ch. D., 447 (452), the covenant for renewal creates an equitable estate from the time of its execution, and is part of the lessee's present interest. The right which the present possessor of land has to continue or to drop his possession, is not a right subject to a condition precedent. *See* also Challis' Real Property (1892), p. 176. Cf. *Ramasami* v. *Chinnan* (1901), I. L. R., 24 Mad., 449 (469).

[3] So held by Lord Justices Knight Bruce and Turner in *Hope* v. *Corpn. of Gloucester* (1855), 7 DeG. M. & G., 646; 25 L. J. Ch., 145.

[4] The cases will be found collected and discussed in Lewis on Perpetuities, pp. 174-407, suppl.

practical importance, as the bequest may sometimes be bad for remoteness if it is intended that the gift over shall take effect whenever *A's* issue becomes extinct, even in the remotest generation, whereas, the bequest may be good if the gift over is intended to take effect only if *A* has no children living at his death. The cases upon the point are numerous, and not always easy to reconcile; I do not intend, however, to deal with the matter here, for, in the first place, I see no reason why technical and often highly artificial rules of construction adopted in the English Courts should be imported into this country;[1] and, secondly, even if the rules were applicable, the proper place to discuss them would be a treatise on the construction of wills. Such a discussion would be wholly out of place in a work on perpetuities, for there can be no doubt how the Rule against Perpetuities applies to bequests either on definite or on indefinite failure of issue.[2]

Failure of issue.

pp. 68-96; Marsden on Perpetuities, pp. 182-205; Hawkins on Wills, Chap. 17; Jarman on Wills, Chap. 41; Theobald on Wills, Chap. 42; Underhill on Interpretation of Wills and Settlements, p. 167. Tudor, L. C., Real Property, *Forth* v. *Chapman* (1719); and notes thereon, pp. 371–381. Cf. Indian Succession Act, sec. 111, Illust. (*b*): "A legacy is bequeathed to *A*, and in case of his death without children, to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect." See *Narendra Nath Sircar* v. *Kamalbasini Dasi* (1896), L. R., 23 I. A., 18; *Ramjewan Lal* v. *Dalkoer* (1897), I. L. R., 24 Cal., 406; *Monohur* v. *Kasiswar* (1897), 3 C. W. N., 478. In *Soorjomonee Dossee* v. *Denobundhoo Mullick* (1857) (6 Moore I. A., 526), which was decided before the Indian Succession Act was passed, such a bequest was held to mean that if *A* should die, whether before or after the death of the testator, without leaving a child, the gift over would take effect, and the legacy vest in *B*; this seems to accord with the English cases; see *Edwards* v. *Edwards* (1852), 15 Beav., 363; *Allen* v. *Farthing* (1816), 2 Jarman, 1596; 2 Mad., 310. *See* also Phillips and Trevelyan on Hindu Wills, pp. 78, 306.

[1] *See* an instructive article in 8 Jurist, Part II, pp. 261, 273, where it is pointed out that an estate for years with a perpetual covenant for renewal is, so far as questions of remoteness are concerned, substantially a fee, and as such it is regarded.

[2] In the case of *Narendra Nath Sirkar* v. *Kamal Basini Dasi* (1896), 23 I. A. 18 (26); I. L. R., 23 Cal., 563, the Judicial Committee observed:—"To search and sift the cases on wills which cumber

Effect of failure of prior limitation upon subsequent limitation.

I have now explained to you the scope of the Rule against Perpetuities, and the principles which regulate its application. I purpose to conclude this lecture with a discussion of the important question how a subsequent limitation is affected by the failure of a prior limitation which is tainted with the vice of remoteness. The law on the subject is thus laid down in sec. 103 of the Indian Succession Act:

"When a bequest is void by reason of any of the rules contained in the three last preceding sections,[1] any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void."

There are two illustrations added to this section:

"(*a*) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of twenty-five, for his life, and after the decease of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of twenty-five, which bequest is void under sec. 101. The bequest to *B* is void.

(*b*) A fund is bequeathed to *A* for his life, and, after his death, to such of his sons as shall first attain the age of twenty-five, and, if no son of *A* shall attain that age, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect upon failure of the bequest to such

our English Law Reports, in order to understand and interpret wills of people, speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life, seems absurd. In the subordinate Courts of India, such a practice, if permitted, would encourage litigation and lead to idle and endless arguments."

[1] Of these, sec. 101 contains the Rule against Perpetuity. This section, so far as it goes, expresses the law applicable to all wills of Hindus; see *Anandrao* v. *Administrator-General* (1895), I. L. R., 20 Bom., 450.

of *A's* sons as shall first attain the age of twenty-five, which bequest is void under sec. 101. The bequest to *B* is void."[1]

Limitations expectant upon void limitations.

The principles laid down here appear to be substantially in accord with English law by which, as a general rule, limitations following upon limitations void for perpetuity are themselves void, whether within the line of perpetuity or not. Thus, in one of the early cases on the subject,[2] there was a disposition to the first son of *A*, who should be bred a clergyman, and should be in holy orders; and, if *A* should have no such son, then over; and, there was no son. As the son could not take holy orders till the age of twenty-four, the limitation as it stood was too remote; but, it was argued, not without reason, that the limitation over embraced two events, namely, there being no son, and that, being a son, he did not take holy orders, and that the first was good. The Court, however, held that they could not divide the contingency, that the devise to the son was void by reason of the uncertainty of the time when he would take holy orders, and that the devise over was also void as "there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take

Proctor v. *Bishop of Bath.*

[1] This illustration appears to be based on the case of *In re Thatcher's Trusts* (1859), 26 Beav., 365, where Sir John Romilly, M.R., observed: "The distinctions on this subject are well defined, although they may not be in every case susceptible of a ready application to the particular words of a will. On the one hand, it is clearly settled, that if there be two alternative limitations, one branch of which is too remote, and the other of which is capable of taking effect, the Court will disregard the invalid limitation, and give effect to that which is legal. *Longhead* v. *Phelps* (1770), 2 Sir W. Bl., 704, is an instance of this distinction which rests on sound and settled rules of construction. On the other hand, if the limitations are ulterior to or expectant upon limitations which are too remote, they are void also, although made to a person in existence at the date of the will. The cases of *Beard* v. *Westcott* (1810), 5 Barn. & Ald., 801; and *Monypenny* v. *Dering* (1852), 2 De G. M. & G., 145, are instances of the second class of cases."

[2] *Proctor* v. *Bishop of Bath and Wells* (1794), 2 H. Bl., 358; 3 R. R., 417.

effect, but the contrary was expressly decided in the House of Lords in the case of *The Earl of Chatham* v. *Tothill*."[1] The next case which you may usefully consider is *Beard* v. *Westcott*,[2] which engaged the attention of the Court of Common Pleas, the Court of King's Bench and the Court of Chancery successively, and which has been much criticized and explained. In that case, successive life estates were given by the testator to a grandson and his unborn issue, which were clearly void beyond the first son; then followed the disposition: "And in case there shall be no issue male of the grandson, nor issue of such issue male at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they shall respectively attain their respective ages of twenty-one years, without lawful issue male, the estate to go over." The Judges of the Court of Common Pleas, to whom the case was sent, were of opinion that the gifts after the gift to the unborn son of the grandson were void, but that if the event mentioned happened, the event being within the legal limits, the gift over would take effect. The case was subsequently sent to the Court of King's Bench, where the Judges held that the gift over was void, not because it was not within the line of perpetuity, but upon the express ground that the limitations over were never intended to take effect unless the previous persons would, if they had been living, have been capable of enjoying the estate, and that the testator did not intend that the estate should wait for persons to take on a given event, where the person to take was actually in existence, but could not take. This view was subsequently affirmed by Lord Chancellor Eldon. This important decision

Beard v. Westcott.

[1] (1771), 7 Brown P. C., 453. See *Cambridge* v. *Rous* (1802), 8 Ves., 24; 6 R. R., 199, where the same principle is laid down by Sir W. Grant, M. R. *See* also *Somerville* v. *Lethbridge* (1795), 6 T. R., 213; 3 R. R., 157, which, however, is too imperfectly reported to justify any certain inference.

[2] (1810—1822) 5 Barn. & Ald., 807; 5 Taunt., 393; Turn. & Russ., 25; 24 R. R., 553.

was discussed and explained by Lord St. Leonards[1] in *Monypenny* v. *Dering*,[2] where the rule was laid down to be that "where there is a gift over, which is void for perpetuity, and, a subsequent independent clause on the gift over, which is within the line of perpetuity, you cannot take under the independent clause, unless you can shew that it will accord and dovetail in with the previous limitations."[3] This you must take along with the primary rule that where a devise is void for remoteness, all limitations dependent or expectant on such remote devise are not accelerated but fall with it,[4] the reason for which is stated in a recent case to be "that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is

Monypenny v. *Dering*.

[1] The case of *Beard* v. *Westcott* had been argued by him when at the bar, in support of the view which ultimately prevailed.

[2] (1852) 2 DeG. M. & G., 182; 22 L. J. Ch., 313. In this case Lord St. Leonards says that the Court of King's Bench held the gift over in *Beard* v. *Westcott*, void, "not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take: and Lord Eldon affirmed that decision." Professor Gray observes upon this passage that the imputation of such an intent to a testator seems unwarranted. Taking the bequest to be personalty bequeathed to *A* and if *A* dies without issue to *B*, and if *B* dies without issue then to *C* for life, suppose the testator had been told, "your bequest to *B* is bad; but if in fact *A* and *B* both die before *C* without issue, would you like *C* to take? There is no legal objection to his doing so, should you wish it," what reason is there to suppose that the testator would have answered it in the negative? It is not as if *C* would step into *B's* place and take what the testator meant *B* to have, for *C* is to have nothing until *B* has died without issue. The intention arbitrarily attributed to the testator is perhaps directly the opposite of the probable intention (Gray, p. 182).

[3] *See* also *Taylor* v. *Frobisher* (1852), 5 DeG. & Sm., 191.

[4] See *Robinson* v. *Hardcastle* (1788), 2 T. R., 241; 1 R R., 467, where Buller, J., says: "If a subsequent limitation depended upon a prior estate which was void, the subsequent one must fall together with it. If indeed the subsequent limitation was not dependent upon the other, it might then take place notwithstanding the first was bad."

exhausted, and as the prior limitation, which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intention of the settlor in favour of the beneficiaries under the subsequent limitation."[1]

Separable and alternative gifts.

From what I have said, you will have seen that where property is given over on an event involving several contingencies, although the gift over cannot be split up into as many gifts over as there are possible events, with a view to sustain the gift over whenever the actual event falls within the limits of the rule against perpetuities, yet if the testator has himself separated the gift so as to make it take effect on the happening of any one of several alternative events, and the event which actually happens is not too remote, the gift over is good. In other words, when the gift over is to arise on an alternative event, one branch of which is within, and the other is not within the prescribed limits, the Court will disregard the invalid limitation and give effect to that which is legal. To take one illustration, in *Longhead* v. *Phelps*,[2] a trust of a term to arise on a contingency, that *A* and *B* should die without leaving issue male, or that such issue male should die without issue, was held to be too remote in one event, and good in the other event; but, as the latter event actually happened, the trust was declared valid without reference to the other contingency. Whether, however, a particular limitation is divisible or not, has been held to be a question of expression, and the principle of the rule was thus explained by Sir George Jessel, M.R., in a recent case[3]:

[1] *In re Abbott; Peacock* v. *Frigout* (1892), 1893, 1 Ch., 54, *per* Sterling, J. *See* also *Williamson* v. *Farwell* (1887), 35 Ch. D., 128.

[2] (1770) 2 Sir W. Bl., 704. See *Goring* v. *Howard* (1849), 16 Sim., 395; 18 L. J. Ch., 105, where the bequest was to the testator's eldest grandson for life, with remainder to his children who should attain twenty-five, but if he should die without children living at his death, then to the other grandsons; the eldest grandson died without issue, and the gift over was held valid.

[3] *Miles* v. *Harford* (1879), 12 Ch. D., 691. See *In re Harvey; Peek* v. *Savory* (1888), 39 Ch. D., 289, where the gift over was construed,

"If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of the rule against perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit, the estate shall go over, although, if that event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and, if giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void. What I have said is hardly intelligible without an illustration. On a gift to *A* for life with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to *A* for life with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded 'or if he shall have no son' is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son certainly never has a son who attains twenty-five or takes priest's orders in the Church of England, still the alternative event will take effect because that is the expression. The testator, in addition to his expression of a gift over, has also expressed another gift over on another event although included in the first event; but the same judges who have held that the second gift over will take effect where it is expressed, have held that it will not take effect if it is not expressed, that is, if it is really a gift over on

Miles v. *Harford.*

not as a gift in the alternative on the happening of either of two distinct events, but as a single gift over on one event involving two things, and it was held that the Court could not separate the gift which had not been separated by the devisor. If the testator has separated the gift so as to make it take effect on the happening of either of two events, the validity of the limitation over will depend upon the event; see *Crompe* v. *Barrow* (1799), 4 Ves., 681; *Leake* v. *Robinson* (1817), 2 Mer., 363; *Cambridge* v. *Rous* (1802), 8 Ves., 12; *Minter* v. *Wraith* (1842), 13 Sim., 52; *Cambridge* v. *Rous* (1858), 25 Beav., 409.

Divisible limitations.

the death before attaining twenty-five or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting ; they will not split the expression by dividing the two events, but when they find two expressions they give effect to both of them as if you had struck the other out of the will. That shows it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if *A* has no son who attains twenty-five, means it to go over if he has no son at all ; it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities."

In spite of this lucid exposition of the law, you will find, however, that it is by no means easy to reconcile the cases on the point, in some of which the limitations have been held to be indivisible, while in others the Courts have managed to discover a sufficient expression of intention that the limitation should take effect in the alternative.[1] The difficulty has been further increased by the fact that in some cases, where the testator had not himself separated the gift, the Courts have held that if the gift can be separated so as to take effect in one event as a contingent remainder, and in another as an executory devise, and the event on which the remainder is limited occurs, the gift is valid. The whole subject, however, was examined afresh in a recent case[2] by

[1] Contrast, for instance, *Burley* v. *Evelyn* (1848), 16 Sim., 290, with *Williams* v. *Lewis* (1859), 6 H. L. C., 1013; 28 L. J. Ch., 505; and see *Dungannon* v. *Smith* (1846), 12 Cl. & F., 546 (625), where Lord Chancellor Lyndhurst said that he would not lend himself "to the process of altering the frame of a will and the phraseology of a will, for the purpose of framing as it were a new will, in order to put a construction upon it to obviate the difficulties arising out of the law against perpetuities."

[2] *In re Bence, Smith* v. *Bence* (1891), 3 Ch., 242. The decision in *Evers* v. *Challis* was explained as having proceeded on the application of the well-known principle that a limitation shall, if and, when, and so far as possible, be construed as a remainder rather than as an executory devise, to dispositions so expressed as to sever the remainders from the

Lord Justice Fry, who held that there was no authority in support of the broad proposition that the terms of a gift over can be split up into as many separate gifts over as there are possible events, and that whenever the actual event falls within the limits of perpetuity, the gift over is good and whenever it falls beyond the limit, it is bad.[1]

The rule, as I have explained it with regard to the effect of a prior remote limitation upon subsequent limitations, was applied by the Judicial Committee to a well-known case from India, which arose before the provisions of the Indian Succession Act had been made appli- *Tagore v. Tagore.*

executory devises. The correctness of the decision in *Watson* v. *Young* (1885), 28 Ch. D., 436, where the gift had been analysed into two distinct alternative gifts, was doubted.

[1] See *Evers* v. *Challis* (1859), 7 H. L. C., 531; 29 L. J. Q. B., 121, where it was held that though a gift over may, as to one alternative, operate as an executory devise, it will not necessarily do so as to another, and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder; the invalidity of one alternative does not necessarily defeat the other. *See* the same case, in its earlier stages, in 18 Q. B., 224; 20 L. J. Q. B., 113; 21 L. J. Q. B., 227. This case is sometimes erroneously relied upon as authority for the position, that when a gift over is to take effect, not only on children failing to reach a remote date, but also on such children never being born, the latter is good though the former is not, although both are included in one expression. What was really decided in the case, was that when a gift over would, apart from the rule against perpetuities, take effect under certain circumstances as a remainder and under other circumstances as an executory devise, and in case it took effect as a remainder, would not be obnoxious to the rule, then if in fact, it does take effect as a remainder, it will be good, although, if it had taken effect as an executory devise it might have done so at a remote period. Where, therefore, the property in question is personalty or an equitable interest in realty or where there is no preceding estate at all, so that the gift over cannot be a remainder and is an executory devise, in either event the principle of *Evers* v. *Challis* does not apply. See *Watson* v. *Watson* (1900), 1901, 1 Ch., 482, where Lord Alverstone, C. J., observed: "The decision in *Evers* v. *Challis* rests on the substantial distinction between a contingent remainder and an executory devise. In the case of a contingent remainder, one has, at the date when the gift should take effect in possession, to ascertain the facts and then decide whether the gift takes effect or not; whereas in the case of an executory devise, one has, at the death of the testator, to ascertain from the will, whom the class includes, and if the class so determined includes objects who *Evers v. Challis.* *Watson v. Watson.*

Tagore v. *Tagore.*

cable to Hindus by the Hindu Wills Act. In *Tagore* v. *Tagore*[1] you will remember the testator attempted to create estates in tail male, descendible according to the law of primogeniture, in each of three lines successively; these were held void by the Privy Council on the ground that no man can be allowed to create a new form of estate or

may not be ascertained within the limit of time allowed by the law against perpetuities, then the devise fails." Rigby, L. J., agreed that the decision in *Evers* v. *Challis* depended upon the essential, not the accidental difference between a contingent remainder and an executory devise. The learned Judges accordingly overruled the contention, that the gift under consideration could be split into as many separate gifts as there were possible events, so that whenever the actual event fell within the limits of perpetuity, the gift over would be good and whenever it fell beyond the limit, the gift would be bad.

[1] (1872) L. R., I. A., Sup. Vol., 47. The scheme of the will was shortly as follows:—

(1) To *J* for life. (2) To his eldest son born during the testator's lifetime for life. (3) In strict settlement upon the first and other sons of such eldest son successively in tail male. (4) Similar limitations for life and in tail male upon the other sons of *J*, born in the testator's life time, and their sons successively. (5) Limitations in tail male upon the sons of *J*, born after the testator's death. (6) After the "failure or determination" of the uses and estates hereinbefore limited, to *S* for life. (7) Like limitations for the sons of *S* and their sons as for the sons of *J*. (8) Like limitations in favour of the sons of *L* and their sons in tail male, as for the sons of *J*.

The only persons in existence at the death of the testator were *J*, *S*, *P*, a son of *S*, and *C* a grandson of *L*. The attempt to create estates in tail male failed, as such estates are unknown and repugnant to Hindu law; the limitations in clauses 2, 3, 4, 5 also failed as the donees were not in existence at the death of the testator and took nothing under the Hindu law. The question, therefore, arose whether upon the termination of the life estate in clause 1, the bequest in clause 6 to *S*, who was competent to take as a donee, could immediately take effect. This was answered in the negative by the Privy Council.

See also *Soudaminey* v. *Jogesh Chunder* (1877), I. L. R., 2 Cal. 262; *Javerbai* v. *Kalibai* (1890), I. L. R., 15 Bom., 326, (1891), I. L., R., 16 Bom., 497, in which latter case, a devise over in default of male issue was treated as an alternative gift, and consequently valid. Cf. *Raikishori Dasi* v. *Debendra Nath Sarkar* (1887), I. L. R., 15 Cal., 409; 15 I. A. 37, where the Judicial Committee held that there were two intentions wholly separable, the second not depending upon the first, and that it was possible to give effect to the first intention without entering into the question, whether the second intention was one, to which the law could or could not allow effect. *See* also *Okhoymoney Dasi* v. *Nilmoney Mullick* (1887), I. L. R., 15 Cal., 282, where Wilson, J.,

alter the line of succession allowed by law. The question, therefore, arose whether the interests which were attempted to be created subsequent to the first valid estate, also failed by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. The Judicial Committee held that when the testator made the subsequent limitations expectant "upon the failure or determination" of the prior limitations, he could not be taken to mean "failure or determination in law," as there was nothing to show that he ever suspected that his will might be void in law, but that he rather contemplated the case of the "failure or determination in fact" of an estate which he considered sufficient in law. The limitations over, which in the scheme of the will were thus held intended to follow the creation of the prior estates, consequently fell therewith, Mr. Justice Willes observing that "the true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred." *Tagore* v. *Tagore.*

It may not be superfluous to point out that if a future interest in any instrument is avoided by reason of the rule against perpetuities, the prior interests are in no way affected, but operate as they would have done if the subsequent limitations had been entirely omitted. To take an illustration, when the bequest is to *A* for life, remainder to his children and their heirs, but if the children all die under twenty-five, then to *B*, the gift to *B* is void, and the

relying upon the case of *Jones* v. *Westcomb* (1711), 1 Eq. Ca. Ab., 245, held, that it was the duty of the Court to find out what the real intention of the testator was, and gave effect to the bequest as an alternative gift. Cf. *Kristo Ramaney Dassee* v. *Norendro Krishna* (1888), I. L. R., 16 Cal., 383; 16 I. A., 29; *Greender Chunder* v. *Traylukhonath* (1892), I. L. R., 20 Cal., 373; 21 I. A., 35; *Tarakeswar Roy* v. *Sasi Sekhareswar* (1883), I. L. R., 9 Cal., 952; 10 I. A., 51.

Prior valid estate unaffected.

children of *A* take an absolute interest.[1] But if a prior valid estate is not affected by the failure of a subsequent estate which is void for remoteness, neither can it be benefited thereby. In other words, the interest which fails does not enlarge the prior estate, but lapses for the benefit of the person to whom property which has been invalidly devised or bequeathed goes; or, as Lord Chancellor Eldon put it in a well-known case,[2] wherever land or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir at law shall have the benefit of the interest so devised as undisposed of, and he takes it not by force of the intent, but by the rule of law. You will see, therefore, that when an intermediate estate fails by operation of law, the next devisee cannot claim to occupy the position he would have done had there been no intermediate devise, inasmuch as the contingency upon which alone the testator intended him to take has not happened, nor can the prior devisee claim it as he, in his character as devisee can only take what is expressly given him by the will. You must not, however, forget that cases may arise where it is clearly expressed or necessarily implied that a gift over, upon failure, shall go, not to the heir but to another devisee, and, in such a case, it must go as the testator intended it to go; thus, where land is devised to *A*, charged with a legacy to *B*, provided *B* attain the age of twenty-one, the devise is absolute as to *A*, unless *B* attain the age of twenty-one; if, therefore, the gift to *B* does not take effect, the heir-at-law does not come in because the whole is absolutely given to the devisee

[1] It is hardly necessary to support such an obvious proposition by an elaborate array of authorities, and it is enough to refer to the case of *Dungannon* v. *Smith* (1846), 12 Cl. & F., 546 (624), where Lord Chancellor Lyndhurst said:—"I do not think the principle can be disputed that if the first estate in the order of succession is not void for remoteness, if it is a good estate, it would not be affected by the fact of the successive estates being void on that account."

[2] *Tregonwell* v. *Sydenham* (1815), 3 Dow. 194, 15 R. R., 40.

A.[1] The principles I have explained were substantially applied by the Privy Council in *Tagore* v. *Tagore*[2] where it was held that the first life estate was not enlarged into an absolute estate of inheritance by reason of the failure of the subsequent estates in tail male, but that upon the expiration of the life estate, the interest undisposed of belonged to the heir-at-law.[3] Prior valid estate not enlarged.

[1] *Per* Lord Chancellor Eldon, 3 Dow., 210, 15 R. R., 48. Cf. *Watson* v. *Watson* (1900), 1901, 1 Ch., 482, where it was held that where there is an absolute gift followed by a settlement of the subject of the gift, but the trusts of that settlement for some reason, wholly or partially fail, there is, so far as they fail, no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift. Contrast this case with *Lassence* v. *Tierney* (1849), 1 Mac. & G., 551, where there was no absolute gift, but only a gift constituted by the description of the mode of enjoyment, and *Ring* v. *Hardwick* (1840), 2 Beav., 352, which may be taken to be an example of the class of cases in which there has been an absolute gift.

[2] L. R., I. A., Sup. Vol., 47, at 66, 76.

[3] This was held to be so, although the heir-at-law had been expressly excluded from all benefit under the will; for, as Willes, J., put it (p. 79), the heir-at-law cannot be excluded from his general right of inheritance without a valid devise to some other person. Cf. *Tregonwell* v. *Sydenham* (3 Dow., 194, 15 R. R., 48), where Lord Redesdale said: "The question always is, where a purpose pointed out by the testator fails, whether the interest is expressly or by necessary implication given to some devisee; if not, the heir must take." And Lord Chancellor Eldon said: "Whether it was intended for him or not, signified nothing, as he did not take by force of the intent, but by the rule of law."

LECTURE V.

On the Interests affected by the Rule against Perpetuities.

Nature of interests affected.

In the present lecture, I purpose to examine and illustrate the nature of the interests subject to the Rule against Perpetuities. I have already explained to you that wherever a right or interest is presently vested in *A* and his heirs, although the right may not be exercised until the happening of some contingency which may not take effect within the period defined in the Rule against Perpetuities, such right or interest is not obnoxious to that rule. You will also remember that the ground for this important distinction lies in the fact that the rule is aimed at preventing the creation of future interests upon remote contingencies, and that its effect in removing the suspension of the power of dealing with property, is a mere incident; in other words, when there is a present right of that sort, although its exercise may be dependent upon a future contingency, the right is vested in an ascertained person, and such person, concurring with the person who is subject to the right, can make a perfectly good title to the property. From this it follows at once that easements, *profits à prendre*, and other rights over the lands of others, which are compendiously included by Roman jurists under *jus in alieno solo*, are not future but present interests, and consequently the Rule against Perpetuities has no application to them.[1] Besides, as I have already pointed

Vested interests unaffected.

[1] The observation of Sir George Jessel, M. R., that "an exception to the rule against remoteness has been thoroughly established in many cases at law, as regards easements" can hardly be called strictly accurate. (*London and S. W. R. Co.* v. *Gomm* [1882], 20 Ch. D., 562, 583).

out, the rule against remoteness only requires that future interests should not be created so as to take effect beyond certain defined limits; it does not further require that an interest validly created should terminate within the same limits; hence, a provision that an easement shall determine on a specified contingency, is not invalidated by the remoteness of that contingency. Ordinarily, a future limitation is affected by the rule against remoteness, not because it marks the termination of the interest in possession at a remote period, but because it marks the initiation of the subsequent interest; in other words, the operation necessarily involves a transfer of possession; this, of course, is impossible in the case of an easement, as the termination of one easement does not mean the creation of another, it simply means its total extinction. I ought to add that the observations I have made are equally applicable to what are called equitable easements. If an owner of land binds himself by contract to limit his use of that land in a particular manner for the benefit of other land belonging to himself or to third persons, he is regarded in equity as imposing a trust on his land; the restriction so imposed creates an equity between the original parties, binding all who come into possession derivatively with notice of it, and, may, therefore, be enforced against their successors in title, save in the case of a purchaser for value without notice.[1] A right, so created, and sometimes called an equitable easement, is, of course, a present interest, and not subject to the Rule against Perpetuities[2] and, even if such a right includes a right to enter upon the servient tenement and abate any structures which may be raised to the injury of the

Easements.

Equitable easements.

[1] *Tulk* v. *Moxhay* (1848), 2 Phil, 774, 18 L. J., Ch., 83; *Keats* v. *Lyon* (1869) L. R., 4 Ch. Ap. 218; 38 L. J. Ch., 357.

[2] See *Exp. Ralph* (1845), DeGex, 219, where Lord Justice Knight Bruce observed, "there seems some difficulty in understanding the objection to such a modified enjoyment of property on the ground of its supposed tendency to a perpetuity." *See* also *Mackenzie* v. *Childers* (1889), 43 Ch. D., 265, where it was held that a restrictive covenant on contract not being a limitation of property, is not obnoxious to the Rule against Perpetuities.

equitable easement, its nature is not altered ; the title to the property is in no way affected ; simply because the owner of the dominant tenement is entitled to do what the law would undoubtedly do for him, that does not make his right subject to the Rule against Perpetuities.

Rights of entry.

We shall next consider whether rights of entry for condition broken are subject to the Rule against Perpetuities. There can be no reasonable doubt that such rights are both within the letter and the spirit of the rule. It had, indeed, been suggested at one time, in England, that such rights should be excluded from the operation of the rule, on the ground that they are common-law interests, and can be released at any moment. The first of these reasons is manifestly bad, as the rule was created and gradually shaped by the Courts to effect a general end of public policy, to restrain future interests dependent upon the most distant contingencies, and there is nothing in its history or policy to suggest the inference that all future interests, whether common law, equitable or statutory, do not fall within it. The second reason suggested is equally bad, for as I shall presently show, future interests may be too remote even if they can be alienated or released. We may take it, therefore, that such rights are not exempt from the operation of the rule in England, and, in this country wherever the provisions of the statutes are applicable, there is really not much room for doubt.

Incidents of right of entry.

It is hardly necessary here to examine in detail the nature and incidents of a right of entry for condition broken ; it is enough to say that such a right is in the nature of a future interest which arises from a conveyance being on condition, implied or express. Thus, in England, all estates were conveyed on the implied condition that the tenant should not deny the tenure. Express conditions also, may, sometimes be attached to a grant ; for instance, an estate may be granted to *A*, his heirs and assigns on condition that he and they should take and continue to use the name and arms of *X*. On

breach of a valid condition, the grantor has a right to enter, but such right of entry, it seems, both here and in England, is inalienable[1]; advantage of a condition can consequently be taken only by the grantor and his heirs, and the right does not exist for the personal benefit of one who has no concern with the land. You must not presume, however, that a grantor is entitled to impose upon the interest created any and every condition he chooses; his privileges, in this respect, are extremely limited; he cannot impose a condition repugnant to the quality of the estate; for example, he cannot impose upon property in the hands of an absolute owner, a condition which takes away the whole power of alienation substantially.[2] But it is not necessary for us to discuss now what conditions may be validly imposed by a grantor; all that we have to examine is, if the condition upon breach of which the right of entry is reserved, whether otherwise good or bad, is confined within legal limits.

The principle I have explained is well illustrated by some of the cases in the books. Thus, in *In re Macleay*,[3] there was a devise to the brother of the testator with the condition annexed that he was never to sell out of the family; Sir George Jessel, M.R., held that the condition was good, and remarked: "First of all it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and, therefore, is not void on any ground of remoteness. It is not, strictly speaking, limited as to

In re Macleay.

[1] "A mere right of re-entry for breach of a condition subsequent, cannot be transferred to anyone except the owner of the property affected thereby." Act IV of 1882, sec. 6, cl. (*b*); cf. 44 & 45 Vict., c. 41, sec. 10, cl. (1).

[2] *See* the Transfer of Property Act, secs. 10, 11, and 12, which invalidate conditions which are in absolute restraint of alienation, or are repugnant to the interest created, or make the interest determinable on the insolvency of the grantee, or upon attempted alienation by him. Cf. Co. Lit., 223 *a*. Touchstone, 129. *Shaw* v. *Ford* (1877), 7 Ch. D., 669 (674), where Fry, J., said: "Any executory devise to take effect on an alienation or on an attempt at alienation, is void, because the right of alienation is incident to every estate in fee-simple as to every other estate."

[3] (1875) L. R., 20 Eq., 186.

time, except in this way, that it is limited to the life of the first tenant in tail (fee simple?); of course, if unlimited as to time, it would be void for remoteness."

Dunn v. *Flood.*

Again in *Dunn* v. *Flood*,[1] which was an action by a vendor for specific performance, the land was subject to a condition that if it was used for certain trades, the grantor might enter upon the premises and receive the rents, till the trades were discontinued, and for three months longer. Mr. Justice North, referring to a passage from Lewis on Perpetuities[2] and another from Sanders on Uses and Trusts,[3] held the covenant void for remoteness and observed: "The right to re-enter may come into operation at any time whatever, so that there is no limit of time fixed during which it is to apply, no limit to prevent its being a claim in perpetuity. The question is whether that is a power to which any effect can be given. The interest to arise under this power of re-entry is executory, and will not vest until after the expiration of, or necessarily within, the period fixed and prescribed by law for the creation of future estates and interests, and is not destructible by the persons for the time being entitled to the property subject to the future limitation; it is too remote, therefore, and cannot be put into force."

Right of entry upon failure to pay rent.

But though there is thus ample authority for the proposition that a right of entry for breach of condition may sometimes be obnoxious to the Rule against Perpe-

[1] (1883) 25 Ch. D., 629; (1885) 28 Ch. D., 586.

[2] "A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." Lewis, p. 164.

[3] "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee-simple of the property discharged of such future use or estate before the event is determined, or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." 1 Sanders, 204.

tuities, it is necessary to observe here that doubts have been expressed whether the principle is applicable to a right of entry reserved for non-payment of rent.[1] In the case of leases for years, however long the term or whatever the conditions to which the term is subject, the reversion is vested in an ascertained person and his heirs, and, can, therefore, never be remote ; the right of re-entry may, in such a case, be properly regarded as one of the incidents of the reversion, and is, consequently, not subject to the operation of the rule. Similarly, a right to enter and hold possession till the arrears of rent are discharged, is analogous to the right of distraint[2] and is more a matter of remedy than an interest subject to the rule against remoteness. But if property is transferred absolutely and in perpetuity, subject only to the payment of rent, and no reversion is reserved in the grantor, it is difficult to see why a covenant which entitles the grantor, upon non-payment of rent, to enter and be in of his old estate, may not be tainted with the vice of remoteness, specially when you remember that in modern times such covenants have been construed in equity to authorise the grantor to hold only till the arrears are satisfied.[3]

Rule does not affect personal contracts.

We have next to consider whether covenants other than covenants reserving a right to re-enter upon breach of condition, come within the pale of the Rule against Perpetuities. Now, it may be laid down broadly that the rule affects rights of property only, and does not touch contracts which do not create rights of property. It is immaterial whether the covenant runs or does not run with the land, or whether it can or cannot be enforced as well against the original parties as their representatives, or whether it has or has not a right of distraint attached to it ; the essence of the matter is whether the

[1] Lewis, 618.

[2] A right to distrain on land other than that for which arrears are due, stands on the same footing ; see *Daniel* v. *Stepney* (1874), L. R., 9 Ex., 185.

[3] Tudor, L. C., Real Prop., 61 ; 2 White & Tudor, L. C., 262.

contract gives a specific claim to some specific property, for a general claim to damages, upon the breach of a personal covenant, stands out of all relation to the rule.

Walsh v. *Secretary of State.*

The case of *Walsh* v. *Secretary of State for India*[1] affords a remarkable illustration of the inapplicabilty of the doctrine of perpetuities to purely personal covenants, for instance, covenants to pay money upon an event which may arise at a distant period, as distinguished from covenants which contain a reservation of an interest in land to arise at an indefinite time. In that case there was a covenant by the East India Company, made in 1770, that "if they should at any time thereafter by any means otherwise than the fate of war be dispossessed of their territorial acquisitions in Bengal, and the revenues arising thereby, so that the jaghire granted to Lord Clive should cease to be paid to him or his assigns, or in case they should at any time before 1784 cease to employ and maintain in their immediate pay and service a military force in the East Indies," they should pay Lord Clive or his successors certain sums of money, and further that "if after 1784, it should so happen that the Directors and Company should have no military force in their actual pay or service," they should make certain further payments. Of course, the contingency was one which might not have happened for centuries, and, as a matter of fact, it did not happen till about a century after the date of the covenant; but the covenant was held good.[2] The same principle was followed in the decision of the House of Lords in *Witham* v. *Vane*[3] where there was a covenant

[1] (1863) 10 H. L. C., 367.

[2] It does not appear from the report of *Walsh* v. *Secretary of State for India*, 10 H. L. C., 367, that the question of perpetuity was actually decided, but as appears from the judgment of Lord Chancellor Selborne (who, when Solicitor General, had argued the case of Walsh) in *Witham* v. *Vane* (House of Lords, 27th April 1883) that "the notion of perpetuity was thrown out tentatively in the arguments but met with no countenance."

[3] Challis, Real Property, 401; cf. *Morgan* v. *Davey* (1882), 1 Cab. & El., 114, where a lessee covenanted for himself, his heirs and assigns, to pay certain sums "by way of rent charge on royalty or reservation" if he should mine coal; the

by a purchaser of lands, in favour of his vendor, that the purchaser and his representatives should pay to the vendor and his representatives royalty at a specified rate, for all coals that might be wrought out of the lands conveyed; it was held that a mere personal covenant as this did not confer upon the vendors any interest in the land, and was, consequently, not open to objection on the ground of remoteness.[1] You must not, however, fail to distinguish the class of cases we have been dealing with, from another with which they may easily be confounded, for although the rule may not affect the creation, it may affect the transfer of contractual obligation; for instance, if one of the parties to a contract, bequeaths his rights under it on a remote contingency, the bequest is invalid; in other words, the transfer of an obligation, though not its creation, must be regulated by the rules which constitute the law of property. *Witham v. Vane.*

You may imagine, perhaps, that the distinction I have explained between a covenant which is purely personal, and another which reserves an interest in land, is fairly simple, and that there ought not to be any difficulty in ascertaining whether a particular covenant falls under the one class or the other. As a matter of fact, however, there has sometimes been considerable difference of opinion upon the question among very eminent judges, and it may, therefore, be desirable to examine some of the leading cases on the subject. Thus, in *Gilbertson* v. *Richards*,[2] *A*, who was entitled to the fee-simple of certain lands,

covenant was held not to be within the rule. *See* also *Aspden* v. *Seddon* (1876), L. R., 1 Ex. D., 496.

[1] *See* the judgment of Ayyangar, J., in *Ramasami* v. *Chinnam* (1901), I. L. R., 24 Mad., 449 (468) where it is pointed out that a covenant to convey, though it does not run with the land, binds it, and creates an equitable interest in the land in favour of the person entitled to call for a conveyance and that therefore the rule against perpetuities is applicable as much to executory equitable estates in land as to legal estates. *See* also *Borland's Trustee* v. *Steel Bros.* (1901), 1 Ch., 279, which recognises the principle that the rule against perpetuities has no application whatever to personal contracts.

[2] (1859—60), 4 H. & N., 277; 28 L. J. Ex., 158; 5 H. & N., 453; 29 L. J. Ex., 213.

Hilbertson v. Richards.

agreed to sell them subject to the payment to him by *B*, the purchaser, of £40 a year, for which he was to have a power of distress. *A* and *B* then mortgaged the property to *C* by a deed which contained a proviso that if *C* or anyone claiming under him, should ever enter into possession, the premises should thenceforth be charged with the payment of an annual sum of £40 to *A*, his heirs and assigns. Baron Martin who overruled the objection that the covenant was void for remoteness, held, that although the covenant created an interest in land, the rent charge was 'only a part of the estate in fee-simple of the rent,' and added that "a perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee-simple, it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant." In the Exchequer Chamber, Mr. Justice Wightman answered the objection of remoteness on the ground that the covenant was "a restriction on the amount of the estate of the mortgagee and seemed within the cases as to the power of sale in a mortgagee which, as incidental to his estate, is held not to be within the rule as to perpetuities." Lord St. Leonards [1] apparently did not approve the reason assigned by Baron Martin, but thought that the decision could be supported on the ground that as the exercise of the powers of sale and entry by a mortgagee was not obnoxious to the rule against perpetuities, neither could a condition appended to the exercise of these powers be so. The decision may, perhaps, be supported also on the view that the future right to the £40 annually was not a right of property at all, but a contractual obligation, and thus not within the purview of the rule against perpetuities.

[1] Powers (1861), p. 16.

This decision was followed by Fry, J., in *Birmingham Canal Co.* v. *Cartwright*[1] where a right of pre-emption, unlimited in point of time, was reserved in favour of the purchaser ; it was held that the covenant created a vested interest in the property, and could not be impeached on the ground of remoteness. *Birmingham Canal Co.* v. *Cartwright.*

Both these cases were considered in *London & S. W. R. Co.* v. *Gomm*[2] and overruled in so far as they purported to decide that an executory interest which was alienable or could be released was not within the Rule against Perpetuities. But it is not for the purpose of discussing this point, which I shall consider later on, that I now refer to this decision ; I only wish to illustrate here the distinction between a covenant which creates and another which does not create an interest in land. In that case, *A*, in 1865, conveyed land to *B* in fee, and *B* covenanted with *A* that he, his heirs, or assigns would, at any time, on receipt of £100, reconvey the premises to *A*. In 1879, *C* purchased the land with notice of the covenant, and in 1880, *A* demanded a conveyance, and upon *C*'s refusal, sued for specific performance of the contract. Mr. Justice Kay held that as the covenant did not run with the land, and would not bind a purchaser without notice, it must be treated as a contract which did not create any estate or interest, properly so called, in property, and was consequently not within the Rule against Perpetuities.[3] This decision was reversed by the Court of Appeal.[4] Sir George Jessel, after pointing out that the contract was unlimited in point of time, observed : " Whether the rule applies or not, depends upon this, as it appears to me, does or does *London & S. W. R. Co.* v. *Gomm.*

[1] (1879) 11 Ch. D., 421.

[2] (1882) 20 Ch. D., 562.

[3] " A contract not creating any estate or interest properly so called in property, at law or equity, is not, in my opinion, obnoxious to the rule. For instance, a covenant to pay £1,000 when demanded, with interest meanwhile, if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time." *Per* Kay, J., 20 Ch. D., 575.

[4] Sir George Jessel, M.R., Sir James Hannen, and Lord Justice Lindley.

not the covenant give an interest in the land? The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase, there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man, who is liable to convey, is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land. It was suggested that the rule has no application to any case of contract; but in my opinion, the mode in which the interest is created, is immaterial; whether it is by devise or voluntary gift or contract, can make no difference. The question is, what is the nature of the interest intended to be created? Now, is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to *A* in fee, with a proviso that whenever a notice in writing is sent and £100 paid by *B* or his heirs to *A* or his heirs, the estate shall vest in *B* and his heirs, and, a contract that whenever such notice is given and such payment made by *B* or his heirs, to *A* or his heirs *A* shall convey to *B* and his heirs. It seems to me that in a Court of Equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other."

London & S. W. R. Co. v. Gomm.

The principle of the applicability of the rule against remoteness to contracts which create an interest in property, is undoubtedly applicable in this country, and, as I shall presently show, has in fact been substantially applied. But in the case of a contract for sale, which is

one of the classes of contract referred to by Sir George Jessel, some difficulty, it is apprehended, may apparently be created by the language of the statutes. Section 54 of the Transfer of Property Act provides that a contract for the sale of immoveable property, does not, of itself, create any interest in or charge on such property ; and the Rule against Perpetuities is thus formulated in Sec. 14 : "No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong." From this it may be argued that as a contract for sale does not create an interest in property, it is excluded from the operation of the rule. When we remember, however, that such a contract is specifically enforceable under Sec. 27 (*b*) of the Specific Relief Act, and has generally all the incidents which it possesses under the English law, it seems likely that it was never intended to make the Rule against Perpetuities inapplicable to such a contract ; possibly no departure was intended in this respect from the principles of English law, and Sec. 54 was only meant to provide that a contract for sale gives no real right, no interest in the nature of a right *in rem*. Besides, as Sec. 14 avowedly does not affect any rule of Hindu, Mahomedan or Buddhist law, the difficulty I have suggested can occur in practice only in an extremely limited number of cases.[1]

Contract for sale under the Transfer of Property Act.

In a recent case[2] to which the provisions of the Transfer of Property Act were, of course, inapplicable, the Courts had to consider the validity of a grant made by a Hindu owner of a Raj estate, under which the grantor covenanted to maintain certain persons and their descendants and declared that upon failure of the Raja

Chundi Churn v. Siddheswari.

[1] *See* an instructive discussion of this point in the judgment of Ayyangar, J., in *Ramasami* v. *Chinnan* (1901), I. L. R., 24 Mad., 449 (468).

[2] (1888) *Chundi Churn Barua* v. *Siddheswari Debi*, I. L. R., 16 Cal., 71 ; L. R., 15 I. A., 149.

of the day to maintain such descendants, they would have an immediate right to four of the Raj villages. The Privy Council held that the grant was invalid ; and Lord Watson after pointing out that if it was regarded as a contract, it was not a mere personal contract, but a covenant running with the Raj estate and binding its possessor to give the villages in the event specified, went on to observe : "It is immaterial in what way such an interest is created. If it prevents the owner from alienating his estate discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law."

Covenants for pre-emption.

I am not aware that any attempt has been made to apply the doctrine of perpetuities to mortgage transactions except in relation to covenants for pre-emption. In a recent case,[1] which came before the High Court of Madras, a question was raised as to the validity of a covenant in an instrument of mortgage by which a right of pre-emption was reserved to the mortgagee. The mortgagor sold his equity of redemption in contravention of the terms of the deed, and an execution purchaser of the interest of the transferee instituted an action for redemption against the representative of the mortgagee, who pleaded in defence the right of pre-emption created in his favour by the mortgage deed. The learned Judges overruled the objection of the mortgagee on the ground that where a right of pre-emption springs from contract, it stands no higher than a contract for sale of immoveable property and does not of itself create any interest in or charge on the property and consequently, till the contract is carried out by specific performance, the pre-emptor acquires no title in extinction of the mortgagor's right of redemption ; but Mr. Justice Ayyangar went on to point out[2] that the covenant for pre-emption was within the

[1] *Ramasami* v. *Chinnan* (1901), I. L. R., 24 Mad., 449.

[2] I. L. R., 24 Mad., 467.

mischief of the Rule against Perpetuities and therefore void : "Of course if the covenant were construed as one, enforceable only during the mortgagor's lifetime, though the mortgage may continue beyond his lifetime, it will not be obnoxious, at any rate, to the law of perpetuities as based upon English doctrine. But if its right construction be, as I think it is, that the parties intended that the right of pre-emption is to last until the redemption of the mortgage, the covenant will, according to English law, as settled by the decision of the Court of Appeal in *London and South-Western Railway Co.* v. *Gomm*,[1] overruling the decision of Fry, J., in *Birmingham Canal Co.* v. *Cartwright*,[2] and followed by Bacon, V. C., in *Trevelyan* v. *Trevelyan*,[3] be void for remoteness." The same view was taken in a recent case which came before the High Court of Calcutta,[4] where in a suit by the plaintiff to enforce the right of repurchase by way of pre-emption against transferees from the representatives of the plaintiff's vendor, it was held, that a covenant of this character which bound the covenantor and his representatives to re-convey the property to the vendor without any definite limit as to the period of time within which the covenant was to be operative, was bad for remoteness and could not be enforced.[5]

Mortgages.

Apart from covenants for pre-emption, there is no reason why the rule against perpetuities should not apply to mortgages for the payment of money or the performance of other acts at a time which falls beyond the line of perpetuity. When the conditions of a mortgage must

[1] (1882), 20 Ch. D., 562.

[2] (1879), 11 Ch. D., 421.

[3] (1885), 53 L. T. (N. S.), 853.

[4] *Nobin Chandra Soot* v. *Nababali Sarkar* (1900), 5 C. W. N., 343.

[5] The same view was apparently taken by Markby, J., in *Tripoora Soondary* v. *Juggurnath Dutt* (1875), 24 W. R., 321, where that learned Judge doubted the validity of a perpetual covenant for the disposition of land ; see also *Stocker* v. *Dean* (1852), 16 Beav., 161, where Sir John Romilly, M. R., doubted whether a right of pre-emption, "at all times hereafter" could be enforced after the death of the owner of the property. The contrary view, however, was accepted in the case of *Hares Paik* v. *Johoruddi Gazi* (1897), 2 C. W. N., 575.

Mortgages.

be fulfilled, if at all, within twenty-one years after lives in being or within the limits prescribed by the Indian statutes, no question of remoteness can arise. The mortgagor is regarded in equity as the owner and the mortgagee merely possesses a lien which, on failure of the conditions stated in the mortgage, is converted into a right to have the security applied in satisfaction of his debt. The failure to fulfil the conditions in the mortgage is a condition precedent to the vesting of the right and as the conditions in the mortgage must be fulfilled, if at all, within the limits of the rule, the right is not too remote. On the other hand, if the conditions of the mortgage are such that the failure to fulfil them by the mortgagor may occur beyond the limits prescribed by the rule against perpetuities, it is difficult to see how the rights of the mortgagee can be sustained. Default by the mortgagor is a condition precedent to the right of the mortgagee to have the security applied in satisfaction of the debt; and if the default may not happen till a remote period, that is, beyond the period prescribed by the rule against perpetuities, it may fairly be contended that the condition is too remote and the mortgagee's right invalid. It is not sufficient to say that the mortgagee can at any time assign the mortgage, for, as we shall presently see, the fact that an interest subject to a condition precedent is alienable, does not take it out of the operation of the rule against perpetuities; nor is it sufficient to say, that the mortgagor can pay off the debt at any time, for the mortgagor cannot insist upon paying off the mortgage debt before it falls due. Moreover, it can hardly be contended that the question is one of remedy merely, for the right to the land does not in equity pass from the mortgagor, and the right of the mortgagee to have the security applied for his benefit does not arise until there is default.

In cases, however, in which the instrument of mortgage authorises the mortgagee to sell at any time after default, if the default must take place within the limits of the rule, the mere fact that the power of sale may be exercised at any time and consequently beyond the limits of the rule,

does not invalidate such power ; for the mortgagee acquires a right to sell within the limits of the rule, and the fact that he may not choose to avail himself of the remedy immediately and to acquire a title by a sale under the power, would not clearly affect the validity of the power.

Future interests void for remoteness, though alienable.

I purpose to conclude this lecture with a brief examination of the principal dispositions which are not regulated by the Rule against Perpetuities. But I must first dispose of a very important class of cases to which the principle of exclusion has, I believe, been erroneously applied. It has been said, sometimes by very high authority, that the policy of the Rule against Perpetuities is aimed at limitations which tie up property and take it absolutely out of commerce, and that, as a consequence, future interests, when they can be alienated or released, cannot be too remote. Thus in a well-known case[1] which was decided nearly two centuries ago, and to which I had occasion to refer you, every executory devise was said to be "a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance ;" and it would not be difficult to point out observations by learned Judges, and even express decisions which support the same view. You may, however, now take it as fairly settled that the true object of the Rule against Perpetuities is to prevent the creation of future interests on remote contingencies, and that its effect in the removal of restrictions on the immediate alienation of property, is only an incident. The leading case on the subject which finally decided the point is *London and S.-W. R. Co.* v. *Gomm*,[2] where Mr. Justice Kay laid down that "a present right to an interest in property which may arise at a period beyond the legal limit is void, notwithstanding that the person entitled to it may release it." This view was confirmed on appeal, and the learned Judges overruled the earlier

London & S.-W. R. Co. v. *Gomm.*

[1] (1699), *Scattergood* v. *Edge*, 1 Salk., 229.

[2] (1882), 20 Ch. D., 562.

London & S. W. R. Co. v. Gomm.

decisions in *Gilbertson* v. *Richards*[1] and *Birmingham Canal Co.* v. *Cartwright*[2] which supported the opposite view that an executory interest which could be released was not within the mischief of the rule. In the first of these cases, Baron Martin had laid down that "a perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee-simple, who may deal with it at his or their pleasure and as he or they think fit, it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen or may happen at any time however distant." In the second case, Fry, J., said: "The rule is aimed at preventing the suspension of the power of dealing with property, the alienation of land or other property. But when there is a present right, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person, that person concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and, they can together at any time alienate the land absolutely." The Court, in *London and S.-W. R. Co.* v. *Gomm*,[3] declined to follow these observations, on the ground that if it were held otherwise, the power of tying up property would be greatly extended and estates would be rendered practically inalienable for a period long beyond the prescribed limit.[4] You see, therefore, that it is now clear upon the

[1] (1859), 4 H. & N., 297; (1860), 5 H. & N., 459.

[2] (1879), 11 Ch. D., 421.

[3] (1882), 20 Ch. D., 562.

[4] There are observations of Stuart, V.C., in *Avern* v. *Lloyd* (1868), L. R., 5 Eq., 383, which appear to favour the idea that an alienable interest cannot be too remote; the decision, however, was questioned by Malins, V. C., in *Stuart* v. *Cockerell* (1869), L. R., 7 Eq., 363. The correct view was taken in *In re Edmondson's Estate* (1868), L. R., 5 Eq., 389, where it was conceded that limitations over to the survivors of a class who must all have been born within a life in being were too remote, although if all the class had joined in a conveyance, they could have made a good title. See also *Hobbs*

authorities that if an estate be limited to the use of *A* and his heirs, but if *B* should die without heirs of his body, then to the use of *C* and his heirs, the limitation to *C* and his heirs would be void as tending to a perpetuity, although it was possible for *C* to release or pass his future estate, and, with the concurrence of the necessary parties, to dispose of the fee-simple before there was a failure of issue to *B*. But the contrary opinion, though now exploded, has been deep rooted so long, that traces of it appear now and then in the judgments of very eminent judges.[1]

Exceptions.

We may now briefly consider some of the real exceptions to the Rule against Perpetuities.

Corporation.

The rule has no application where land is purchased or property is held by a Corporation. As Corporations, however, cannot, in general, hold land without license from the Crown, such license, it may be presumed, will be withheld, except in cases clearly beneficial to the public. When therefore, corporations and unincorporated societies for trading and other purposes are created with power to hold land and other property in perpetuity, such property is inalienable, as in the case of the land of a railway company, where there is no statutory power to sell,[2] and the property of literary and scientific institutions.[3]

v. *Parsons* (1854), 2 Sm. & G., 212, where Stuart, V. C., himself had held that after a bequest to the testator's grandchildren, a gift over, if any one of them died under twenty-two, to the survivors or survivor, was void, although all the grandchildren could have made a good title. Similarly, in *Courtier* v. *Aram* (1855), 21 Beav., 91, and *Garland* v. *Brown* (1864), 10 L. T. N. S., 292, limitations to survivors were held too remote, although the class to which the survivors belonged could have made a good conveyance, and must have been determined within a life in being. The dictum to the contrary in *Gooch* v. *Gooch* (1853), 3 DeG. M. & G., 366 (383, 384), can hardly be treated as good law.

[1] See, for instance, *Witham* v. *Vane* (1883, House of Lords, Challis, Real Property, 401, 419), where Lord Blackburn said: "It is not a perpetuity in the sense in which law aims at perpetuities. The person who is entitled to receive this amount and the person who has now got the estates in question, can come to an agreement for releasing it. The parties could settle the matter in that way; it is no perpetuity."

[2] See *Queen* v. *S. W. Railway Co.* (1850), 14 Q. B., 902; *Mulliner* v. *Midland Railway Co.* (1879), 11 Ch. D., 611. See also Grant on Corporations, pp. 98-153.

[3] 17 and 18 Vict. Ch. 112, sec. 30.

Charities.

Gifts to charities do not fall within the rule; but a perpetuity cannot be created in favour of an individual under the cloak of an illusory gift to a charity. The discussion of the whole subject I reserve for the lecture on religious and charitable trusts.

Statutory exceptions.

Property settled upon individuals for memorable public services may be, by express legislation, exempted from the operation of the rule. The instances which will readily occur to you, are those of the Duke of Marlborough[1] and the Duke of Wellington[2] in England, and Sir Jamsetjee Jejeebhoy[3] and Sir Dinshaw Manockjee Petit[4] in this country. An examination of the policy upon which such exceptions are founded, scarcely falls within the scope of these lectures.[5]

Customary easements.

The only other class of legal rights which appear to be real exceptions to the rule against perpetuities and to which I shall now draw your attention, is what are known as customary easements. As illustrations of this class of rights, I may mention that the inhabitants of a village as such, may have a right of way to a church or to a market, or may have a right to dance on a green or to have games or race horses on specified parcels of land.[6] You must carefully distinguish such customary rights enjoyed by the inhabitants of a particular place, from prescriptive rights acquired by particular persons or by the owners of specific parcels of land. In the case of prescriptive rights, when a person acquires such a right, he possesses a present right which is not affected by the rule against perpetuities and which will continue to be enjoy-

As to properties held by Municipal Corporations, *see* 5 & 6 Will. IV, Ch. 76, sec. 2, and *Prestney* v. *Mayor* (1882), 21 Ch. D., 111.

[1] 3 & 4 Anne, C. 6; 5 Anne, C. 3; 5 Anne, C. 4.

[2] 54 Geo. 3, C. 161.

[3] Act XX of 1860.

[4] Act VI of 1893.

[5] For other exceptions, usually of very rare occurrence, *see* Tudor, L. C., 616.

[6] Such customs have been enjoyed not only by persons as inhabitants of a particular locality, but as members of a particular profession, for instance, a custom for victuallers to erect booths during a fair or a custom for fishers to dry their nets on shore, has been held good. See *Tyson* v. *Smith* (1837), 6 A. & E., 745, (1838) 9 A. & E., 406.

ed by persons who claim under him. But when a man has a customary right as an inhabitant of a particular place, he ceases to have it as soon as he loses his character as an inhabitant; no possessor of the right can trace it to any previous possessor, for he does not take as heir or assignee, but acquires a right as an inhabitant; in other words, it is a new right which each owner acquires when he becomes an inhabitant and is consequently subject to the condition precedent of his becoming an inhabitant. As this contingency may not happen till a remote period, such a right may be in violation of the rule against perpetuities. But I cannot find that the question of perpetuity has ever been raised with regard to such customary rights, and possibly most of them, in theory as well as in fact, are traceable to a time when the first foundations of the rule against perpetuities had not yet been laid. But although no attempt has been made to bring such customary rights within the pale of the rule, the inconvenience which might result from such rights hampering the free alienation of land, was felt from early times, and it was decided that such rights could arise by custom only when they were in the nature of easements and that no *profits à prendre* could have their origin in custom.[1] As an illustration of such customary rights, I may draw your attention to the decision of the House of Lords in the case of *Goodman* v. *Mayor of Saltash*,[2] which furnishes a curious instance of inalienable property. The plaintiff claimed a several oyster fishery and sued the defendants for disturbing it; the defendants alleged and established an immemorial custom for all free inhabitants of ancient tenements in the borough of Saltash to take oysters at certain times. In the Common Pleas Division the custom was held to be bad, and this decision was affirmed by the Court of Appeal, but the House of Lords reversed the decision of the Courts below and supported the custom. It was held, that the claim of the inhabitants was not to

Customary easements.

[1] *See* Hall on Commons, 159–212; Williams on Commons, 194–197 and 278–280.

[2] (1882), 7 App. Cas., 633.

Goodman v. *Mayor of Saltash.*

a *profit à prendre in alieno solo ;* that a lawful origin for the custom ought to be presumed if reasonably possible, and that the presumption which ought to be drawn was, that the original grant to the corporation was subject to a trust in favour of the free inhabitants. Lord Chancellor Selborne distinctly supported the custom as a charitable trust, and observed : " In such a grant there would be all the elements necessary to constitute, what in modern jurisprudence, is called charitable trust." " If I give," said Lord Cairns, in the *Wax Chandler's Case*,[1] " an estate to *A* upon condition that he shall apply the rents for the benefit of *B*, that is a gift in trust to all intents and purposes. *A* gift subject to a condition or trust for the benefit of the inhabitants of a parish or town or of any particular class of such inhabitants, is a charitable trust ; and no charitable trust can be void on the ground of perpetuity."[2] Earl Cairns similarly said : " A grant of that kind would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which, in the very wide language of our courts, is called a charitable, that is to say, a public trust or interest for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say, a public interest, it will be free from any obnoxiousness to the rule with regard to perpetuities." [3]

[1] (1873), L. R., 6 H. L., 21.

[2] 7 App. Cas., 642.

[3] 7 App. Cas. 650. See also the speech of Lord Watson at p. 662. Cf. *Thompson* v. *Shakspear* (1860), 1 DeG., F. & J., 399.

It may be pointed out that if the Crown, in a branch of the sea where every one can fish, grants a several fishery to a borough, with a condition that the inhabitants of a certain place can fish also at a time certain, it is just as much a grant to those inhabitants as it is to the borough, and consequently cannot be assumed as the basis for an immemorial custom ; *Lord Rivers* v. *Adams* (1878), 3 Ex. D., 361.

LECTURE VI.

The Rule against Perpetuities as it affects Limitations to Classes and Limitations to a Series.

Gift to class or series.

I PURPOSE to examine, in this and the next following lecture, the operation of the Rule against Perpetuities upon what are familiarly described as gifts to a class and gifts to a series, phrases like many others in familiar use which you will find it rather difficult accurately to define. The subject is of great importance and of frequent occurrence in practice, but unfortunately not altogether free from perplexing difficulties. The first and foremost reason for this unsatisfactory state of things, must be traced, I think, to the fact that until we have an intelligible and practically useful definition of what is meant by a "class," there must be considerable doubt as to the limits within which the rules in this department of our subject, are applicable. The second difficulty which is peculiar to this country, owes its origin to the circumstance that in the large majority of cases which are not regulated by the provisions of the statutes, the limits of the Rule against Perpetuities are vague and undefined, and the application of a rule with such shadowy boundaries to cases of gifts to a class, has not unnaturally resulted in considerable difference of opinion. The most satisfactory order of enquiry will, therefore, be, first to examine the leading principles of the subject under the English law, principles which are, in the main, applicable to cases in this country governed by the provisions of the Indian Succession Act and the Transfer of Property Act, and, secondly, to discuss how far these principles are consistent with Hindu law and ought to be engrafted upon that system.

Fundamental principle.

The fundamental doctrine which lies at the root of the whole subject, briefly described is, that the vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members. To take a familiar example, suppose the bequest to be to *A* for life, and, after his decease to such of his children as shall attain twenty-five. To judge of the validity of this disposition, remember that under the English law, every future interest must be so limited as necessarily to vest or fail of effect within twenty-one years after a life or lives in being, and, that in the application of the rule, regard must be had to possible and not to actual events ; now, it is possible that *A* may have children before the death of the testator, but he may also have all his children or some of them born just before or after such decease, in whom the interest cannot vest within the period prescribed by the rule against remoteness ; the bequest, therefore, as it may possibly fail in respect of all or some of the persons included under the class described in the devise, must fail as to every member of the class.

Indian Succession Act.

The rule laid down in the Indian Succession Act, is substantially to the same effect ; sec. 102 provides that "if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules in the two last preceding sections,[1] or either of them, such bequest shall be wholly void." Two illustrations are added : (*a*) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. *A* survives the testator, and has some children living at the testator's death. Each child of *A*'s living at the testator's death, must attain the age of 25, if at all, within the limits allowed for a bequest. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than eighteen years have elapsed after the decease of *A*. The bequest to *A's* children, therefore, is inoperative, as to any child born after the testator's death ; and as it is given to all his

Illustrations.

[1] Of these sec. 101 contains the Rule against Perpetuity.

children as a class, it is not good as to any division of that class, but is wholly void. (*b*) A fund is bequeathed to *A* for his life, and after his death to *B*, *C*, *D*, and all others, the children of *A*, who shall attain the age of 25. *B*, *C*, *D* are children of *A* living at the testator's decease. In all other respects, the case is the same as that supposed in illustration (*a*). The mention of *B*, *C*, *D* by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.[1]

Definition of class.

The principal difficulty in the application of the rule is, as I have already said, to ascertain what constitutes a gift to a class. One of the most successful attempts to define a class, is to be found in a well-known passage of Jarman on Wills[2] which has been quoted with approval in a recent case before the Bombay High Court:[3]

Jarman.

"A number of persons are popularly said to form a class when they can be designated by some general name as children, grandchildren, nephews; but in legal language, the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, *viz.*, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. Thus a bequest of £1,000 to the children of *A*, the eldest child to take one moiety, the younger children the other moiety, is, in ordinary language, a gift to one class of persons, namely, children; in the legal acceptation of the word, it is a gift partly to an individual, namely, the eldest child of *A*, and partly to a class, namely, his younger children. On the other hand, a gift to *A*, *B*, and *C*, and the children of *D*, share and share alike, may, legally speaking,

[1] *Cf.* sec. 15 of the Transfer of Property Act.

[2] 1 Jarman, 232.

[3] *Per* Sargent, C. J., in *Krishna Nath* v. *Atmaram* (1891), I. L. R., 15 Bom., 543 (548).

be a gift to a class, but yet these persons would not, in the ordinary acceptation of the term, form a class." To this, I need only add the definition given by Lord Chancellor Selborne in *Pearks* v. *Moseley* :[1] "A gift is said to be to a class of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject, in certain proportionate shares ; and the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members." You will see, therefore, that where there is a general limitation, a single gift to a class, which may, according to the event, vest the estate in one within the line of perpetuity or in one without its boundary, the devise wholly fails, although, in the actual event, there is a person answering the description ready to take who was born within due time. But you must carefully distinguish this class of cases from another in which also there is said to be a gift to a class, but of an entirely different character ; for instance, a bequest to the heir male of the body of *A*, for the time being, for life, until an heir male attains twenty-one and then to such heir male absolutely, may be treated as a gift to a class, but the essential distinction between the two classes of cases is that in the former, the members of the class take concurrently the subject matter of the bequest in aliquot shares, in the latter, the members of the class take successively and finally only one of them absolutely, never jointly and together. It is clear that the two classes of cases are subject to very different principles, and you cannot convert a single gift into a series or remodel a series of limitations into a single gift.

Pearks v. *Moseley.*

Successive gifts.

Jee v. *Audley.*

The fundamental principle laid down above is well illustrated by some of the leading cases on the subject. Thus in *Jee* v. *Audley*,[2] which has been described as one

[1] (1880), 5 App. Cas., 714.

[2] (1787), 1 Cox, 324 ; 1. R. R., 46. In *Dungannon* v. *Smith* (1846), 12 Cl. and F., 546 (631), Lord Brougham said of this case : "The judgment in that case, ever since it has been delivered at the Rolls, has been cited with uniform, and

of the cornerstones of the law, there was a bequest of £1,000 to *M* and the issue of her body, and in default of such issue the sum to be equally divided between the daughters then living of *J* and his wife. At the testator's decease, *J* and his wife were over seventy years old, and, they had four daughters then living, who filed a bill to secure the fund ; but Sir Lloyd Kenyon, M. R., dismissed it on the ground that the gift might take in daughters of *J* and his wife, born after the testator's death and was too remote. The result could hardly have been otherwise, unless, indeed, the Court had felt itself free to mould the words of the bequest so as to split it into two parts, one lawful and the other unlawful.

Leake v. *Robinson*.

In *Leake* v. *Robinson*[1] which has been frequently cited both in this country and in England, the bequest was to *A* for life, and after his decease to the children of *A* who being a son, should attain the age of twenty-five, or being a daughter, attain that age or be married with consent, and in case *A* should die without issue living at the time of his decease, or leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age, or be married as aforesaid, then to the brothers and sisters of *A*, upon their attainment of twenty-five or marriages, respectively. In the actual event, five of the brothers and sisters of *A* were born before the testator's death, and, it was contended, that the bequest, though confessedly void as to those born afterwards, was good as to them ; but Sir W. R. Grant, M. R., overruled this contention, and held that the bequest failed in its entirety, observing : " The bequests in question are not made to individuals, but to classes, and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class,

I may venture to say, universal approbation, and really it is as much established as law, as Shelley's case."

[1] (1817), 2 Mer., 363, 16 R. R. 168.

and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death." And the principle of the rule was similarly stated by Baron Rolfe[1] when he said: "The reason why a gift to a class is void when it may embrace some objects too remote, is this: there is no intention to give to any number short of the class, and, therefore, if the prescribed limit may be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period."

Porter v. *Fox.*

Similarly in *Porter* v. *Fox*[2] the bequest was to *A*, the nephew of the testator, and to the grandchildren of the testator to be distributed equally as *A* and the grandchildren should reach twenty-five; here, no doubt, *A*, if he ever reached twenty-five, must have done so within a life in being, namely, his own life, but he might never have reached twenty-five to attain the status of a member of the class; and, even if he did, his share could not be determined till all the grandchildren born before he reached twenty-five, themselves reached twenty-five or died, an event which might happen more than twenty-one years after the death of all the persons alive at the death of the testator. The gift to *A*, as well as that to the grand-children, was consequently void, and, it was so held by Vice-Chancellor Shadwell. You will see, therefore, that when the testator has combined with a remote class, a living person in such a manner as to constitute him a

[1] *Dungannon* v. *Smith*, 12 Cl. and F., 575.

[2] (1834), 6 Sim., 485. See this case criticised, apparently without just reason, by Stuart, V.C., in *James* v. *Wynford* (1852), 1 Sm. & G, 40 (57); see also *In re Mervin* [1891], 3 Ch., 197. *See* also *Webster* v. *Boddington* (1858), 26 Beav., 128.

member of the class, the gift to him cannot be distinguished from, and therefore shares the fate of the other gifts with which it stands blended and associated; you cannot, within the period allowed by the rule, ascertain the share which such a person is entitled to take as a member of the class to which he belongs, not by reason of his description as such, but by reason of the mode and conditions of the gift.

Kingsbury v. Walter.

The whole subject of gifts to a class came up for consideration in a recent case[1] before the Court of Appeal in England which was ultimately taken to the House of Lords. In that case the testator gave property in trust for his wife (who survived him) for life, and after her death for his niece *A* and the children of his sister *B* who should attain twenty-one, equally. At the date of the will there were living *A* and five children of *B*, but *A* died in the life-time of the testator. At the death of the tenant for life, five children of *B* were still living and had all attained twenty-one. In the Court of first instance, North, J., held that the cases upon the point were irreconcilable, and upon a construction of the will, came to the conclusion that the bequest to *A* and the children of *B* was not a gift to a class of which *A* was a member, and that, consequently, the share given to *A* had lapsed by reason of her death in the life-time of the testator and had fallen into the residuary estate. The Court of Appeal[2] reversed this decision, and held that the gift was a gift to a class, and that, consequently, the death of *A* in the life-time of the testator had not caused a lapse of her share, but the whole gift passed to the five children as the members of the class surviving at the period of distribution. Two of the learned Judges declined to lay down any broad proposition of law, while, on the other hand, Romer, L. J., went on to say, that "a gift by will to a class properly so called and a named individual such as *A* equally, so that the testator contemplates *A* taking

[1] *Kingsbury* v. *Walter* (1899) 2 Ch., 314; (1901) App. Cas., 187.

[2] Lord Lindley, M. R., Sir F. H. Jeune and Romer, L. J.

the same share that each member of the class will take, is *primâ facie* a gift to a class."[1] The case was then taken to the House of Lords, which affirmed the decision of the Court of Appeal. Lord Chancellor Halsbury declined to deal with any abstract proposition of law, but held that the bequest, although not in terms to a class, was in favour of persons who fulfilled the conditions of a class. Lord Davey, however, while agreeing with the conclusions of the Court of Appeal, held that the propositions laid down by Romer, L. J.,[1] were not consistent either with authority or principle. The whole matter was put by the noble Lord so forcibly that I shall place before you a passage from his speech :

Lord Davey.

"*Primâ facie*, a class gift is a gift to a class, consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator ; that definition is in accordance with that given by Lord Selborne in *Pearks* v. *Moseley*[2] and by Lord Hatherley, then Wood, V. C., in *In re Chaplin's Trusts*.[3] But it may be nevertheless a class, because some of the individuals of the class are named. For example, if a gift is made, "to all my nephews and nieces including *A*," or if

[1] "When a testator gives property *X* to *A* and a class of persons —say the children of *B*—in equal shares, he intends that the whole of *X* shall pass by his gift, if any one of the children of *B* survive him, even although *A* does not. Clearly if *A* survived and none of the children of *B* survived so as to share, then *A* could take the whole, for *A* would either have to take the whole or nothing, unless indeed it could be said, that you are to look at the number of the children of *B* living at the date of the will, and say there is an intestacy as to the share of each child dying between the date of the will and the testator's death; but that to my mind is only an untenable proposition. If then the testator intended *A* should take the whole if none of the children of *B* survived him to share, I think also he intended the children of *B* to take the whole if *A* did not survive so as to share. Generally, when the testator gives property to be shared at a particular period, equally between a class properly so called and an individual or individuals, the testator *primâ facie* must be taken to mean, that you are to see which part of that aggregated body is to share in that property at the time it comes for distribution, and that such a gift is really a gift to a class," *per* Romer, L. J. (1899), 2 Ch., 318.

[2] (1880) 5 App. Cas., 714.

[3] (1863) 33 L. J., Ch., 183.

a gift is made "to *C* and all other my nephews and nieces," each of those would be a class gift. *Stanhope's case*[1] is an example: there the gift was to four named daughters and all his after-born daughters, and that was rightly, as I think, held to be a class gift. To the same effect is a case before Chitty, J., *In re Jackson*[2] where the gift was to five named individuals and all his other sons and daughters who should be born afterwards and attain the age of twenty-one years. Chitty, J., held that, that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named; he came to this conclusion upon the ground that it appeared from the evidence that those who were named had already attained the age of twenty-one years. There may also be a composite class, such as, for instance, children of *A* and children of *B*: that would be a good class. On the other hand, a gift to *A* and all the children of *B* is *primâ facie* not a class gift, and I think that has been so decided and rightly decided in the case of *In re Chaplin's Trusts*,[3] and also in a case before Sir George Jessel.[4] There was in that case a direction "to divide equally amongst all the children of *R. W.*, the child of *W. W.* and *L.*, his wife, and *A. W.*, the widow of *J. W.* share and share alike;" it was held that this was not a gift to a class and that the share lapsed. I think those cases were rightly decided, and I do not agree with the proposition laid down by Romer, L. J.; that is contrary to the established authorities and to the principles applicable to this branch of the law. But it is perfectly plain that a gift in the form which I have mentioned may be a class gift, if there is to be found in the will a context which will show that the testator intended it to be a class gift, although expressed in the form of a gift

[1] (1859) 27 Beav., 201.
[2] (1883) 25 Ch. D., 162.
[3] (1863) 33 L. J., Ch., 183.
[4] *Walson* v. *Atter* (1881), 29 W. R., 480; 44 L. T. N. S., 240.

to an individual and the children of *A*.[1] These criticisms of Lord Davey upon the proposition of law embodied in the judgment of Lord Justice Romer furnishes ample illustration of the condition of this branch of the law, although eminent lawyers may not be agreed as to the extent to which the authorities are "in inextricable confusion or contradictory or complicated."

Interest must vest at the same time.

I ought to draw your attention to a test which you will sometimes find useful in the determination of the question, whether a particular bequest is a gift to a class. You may take it as a principle well established in this branch of the law, that in the case of a gift to a class properly so called, all the interests of the members of the class must vest in interest at the same time. To take one illustration, if there is a gift to *A* for life and afterwards to *B* and the children of *C*, the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of *C* during the life-time of the tenant for life. Again, if there be a gift to *A* for life and at his death, to be equally divided between his surviving children and the testator's niece *R*, only those children, who survived the tenant for life, would take, whereas the interest of *R* would become vested at the death of the testator. The interest, therefore, of the different persons would not vest at the same time and consequently there is no gift to a class.[2]

Time of determination of share.

We may next consider a class of cases in which the bequest is of the typical form, "to the children of *A* who attain twenty-one, and the sons who attain twenty-one of

[1] See *Aspinal* v. *Duckworth* (1866), 35 Beav., 307, where there was a gift unto and equally amongst the testators' nephew *A* and the children of his sister *B* as tenants in common: Lord Romilly held that, that was a gift to a class. *See* also *Drakeford* v. *Drakeford* (1863), 33 Beav., 43. Cf. *Clarke* v. *Phillips* (1853), 17 Jur., 886; *In re Spiller* (1881), 18 Ch. D., 614; *Shaw* v. *Macmahon* (1843), 4 Dr. & W., 431; *In re Featherstone's Trusts* (1882), 22 Ch. D., 111.

[2] See *Drakeford* v. *Drakeford* (1863), 33 Beav., 43 (48), *per* Lord Romilly, M. R.; *see* also *Kingsbury* v. *Walter* (1901), App. Cas., 187 (194), *per* Lord Davey.

such of the children of *A* as die under twenty-one, *per stirpes*." Here we have a gift to a class composed of children and grand-children of *A* who attain twenty-one. The maximum number of shares is determined at the death of *A*, as the grand-children take only their respective father's share; but it would be erroneous to infer from this that the bequest is good; for the minimum number of shares cannot be determined till the grand-children have attained twenty-one, and this may evidently happen beyond the limits prescribed by the rule, as for instance, if one of *A's* children is under age at the death of *A*, and subsequently dies a minor, leaving an infant son; the whole bequest, therefore, is void.[1] The principle was fully examined by Sir George Jessel, M. R., in a recent case,[2] where the testator gave his estate to trustees upon trust for his wife during widowhood, and after her death or marriage for his children then living, and the issue of

Hale v. *Hale*.

[1] *Per* Lord Romilly, M. R., in *Seaman* v. *Wood* (1856), 22 Beav., 591.

[2] *Hale* v. *Hale* (1876), 3 Ch. D., 643. Sir George Jessel declined to follow the decision of Malins, V. C., in *In re Moseley's Trusts* (1870), L. R., 11. Eq., 499, in preference to that of the Court of Appeal in *Smith* v. *Smith* (1870), L. R., 5 Ch. Ap., 342. The provisions of the will which was considered by Malins, V. C., in *Re Moseley's Trusts* (L. R., 11 Eq., 499) again came up for consideration before Sir George Jessel, M. R., in *Moseley's Trusts* (11 Ch. D., 555) and he held, as he had held before in *Hale* v. *Hale* (3 Ch. D., 643), that the gift to the grand-children could not be separated from that to the children and that the whole was bad. The case was carried before the Court of Appeal, where Lord Justices James, Baggally and Bramwell held themselves bound by *Smith* v. *Smith* (L. R., 5 Ch. Ap., 342) and consequently affirmed the decision of the Master of Rolls. Each of the learned Judges however expressed his disapproval of *Smith* v. *Smith* (L. R., 5 Ch. Ap., 342) and stated his entire agreement with the reasoning by which Malins, V. C., arrived at his conclusion in *Moseley's Trusts* (L. R., 11 Eq., 499). The case was then taken on appeal to the House of Lords (*Pearks* v. *Moseley*, 1880, 5 App. Cas. 714). Lords Selborne, Penzance, Blackburn and Watson affirmed the decision of the Court of Appeal and expressed their surprise that the Judges of the Court of Appeal should have expressed their own decision to be wrong without assigning any reasons. The House of Lords further held, that the point was really decided in the case of *Leake* v. *Robinson*, and that no authority, less than the Legislature, could alter it. *See* also *Webster* v. *Parr* (1858), 26 Beav., 236; *Blight* v. *Hartnoll* (1881), 19 Ch. D., 294.

any child then dead, such issue to take their parent's share equally, the shares of the male children or grand-children to be vested at twenty-four, and of the females to be settled as mentioned in the will. The testator was survived by his widow and children, all of whom had attained the age of twenty-four except a daughter. The whole of the gift after the life interest of the widow was held void for remoteness, and the Master of the Rolls observed: "At the death of the testator, the widow was alive and she had children. No human being could tell at the death of the testator how many of such children would die in the lifetime or before the second marriage of the widow, nor whether any such child so dying would leave sons or not, and if the child so dying left sons, whether or not they would attain the age of twenty-four years. The result might be that a child might die in the lifetime of the widow or before her second marriage, leaving a son under the age of one year, the widow might then die or marry, and such son might not attain twenty-four years of age within the legal period; and, consequently, you could not within that period ascertain the class to take, for that is the important point. The class you could ascertain in one sense; you could say that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say at the testator's decease that in no case could the whole class to take exceed the whole number of the testator's children, because grand-children would only come in the place of children. In that sense, the class is ascertainable, but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four after the legal period, and then that share ought to come back to the others if you could divide it; but you could not. It must remain absolutely uncertain what share each child would take until it was

Sir George Jessel.

ascertained whether the grand-children attained twenty-four or not. The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares, that is, could you say, I will give to each child his minimum share, and, only declare so much to be void for remoteness as he may possibly take beyond the legal period? Then again you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more. As I understand it, *Leake* v. *Robinson* and the whole of that class of cases negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this Court, which has held the whole gift void unless you can ascertain the shares within the period.'

This view of the law, so lucidly set forth, was approved by the House of Lords in *Pearks* v. *Moseley*,[1] where the bequest was, in substance, to the children of *A* who shall attain the age of twenty-one, and the issue of such of them as shall die under that age, leaving lawful issue at their decease, which issue shall afterwards attain the age of twenty-one or die under that age leaving issue, the issue of the deceased children to take by way of substitution the shares of their respective parents. It was held that the entire bequest was void for remoteness, and that parts of it could not be severed, so as to

Pearks v. Moseley.

[1] (1880) 5 App. Cas., 714.

entitle us to treat one portion as good, though the other was bad.[1] Lord Penzance pointed out that in *Dungannon* v. *Smith* the House of Lords had, in effect, adopted the principle that where a testator has made a general bequest embracing a large number of possible objects, the Court cannot mould it so as to say that it is divisible into two classes, one embracing the lawful and the other the unlawful objects of his bounty.

Substitutionary gift.

If, however, there is an unfettered gift to a class which does not offend against the rule, followed by what is called an independent substitutionary clause which is affected by the vice of remoteness, the original gift is good, and the substitution bad. To take one instance, the bequest in *Goodier* v. *Johnson*[2] was to the children of the testator's unmarried son and daughter, and the issue of such of the children as should die before the death of the son, daughter, and the son's future wife. The gift over to the issue was bad, as it was not to take effect until the death of the son's widow who might not have been born in the testator's life-time, and, if the bequest was taken to be to a class, it failed in its entirety. The Court of Appeal, however, construed the gift to the issue as an independent substitutionary gift and held that the right to the property was in all the children, and not merely in such of them as might survive the son's widow, and the issue of those that might have died earlier; in other words, that all the children had vested interests, which, upon the death of any of them without issue, would pass to his representatives. Consequently, though the gift over was void for remoteness, the original gift remained unaffected. It must be confessed, however, that the language of bequests has sometimes been twisted to bring it within this exception, from a natural desire to carry out as far as possible the intention of settlors and testators; indeed, in the very case we have been considering, Sir George Jessel

Goodier v. *Johnson.*

[1] (1846) 12 Cl. & F., 546.
[2] (1881) 18 Ch. D., 441.

admitted that the language used was not appropriate to a clause of substitution.[1]

I have just pointed out to you that to the primary rule that where there is a gift to a class, any member of which may have to be ascertained beyond the limits of perpetuity, the whole gift is void, we have the exception that where a part of this gift is by way of substitution, the gift to the original class is good, although the substitutional gift may be void for remoteness. I ought to draw your attention to another well-marked exception, founded on the distinction between gift of a fund to a class and gift of a sum to each member of a

Gift of a fund to a class.

[1] *See* for instance *Packer* v. *Scott* (1864, 33 Beav., 511), which seems rather difficult to support. In that case, a testatrix had bequeathed her personal property in trust when and as the child or children of her niece should severally attain twenty-one years, to pay and divide it equally between them and the child or children of such of them (if any) as might die under twenty-one years, but so as nevertheless, that the child or the children collectively of any deceased child, on their severally attaining twenty-one years, should take between them equally such share only as his, her, or their parent would have taken if living; the will further directed that so long as any child or children of the niece, or any descendant of such child or children, should be under twenty-one years, and the niece should be living, the income arising from the share or shares to which such child or children or descendants thereof should be presumptively entitled, should be paid to the niece to be applied by her to their maintenance; the testatrix further authorised the trustees to advance any sum not exceeding £100 for each such child or descendant or descendant of a child by and out of their shares for their advancement, and directed, if the niece should die before the shares were payable, that the trustees should apply the income towards the maintenance of the persons respectively who might then be presumptively entitled thereto. Lord Romilly said: "I should be striking words out of this will, if I held, that the payment or the division could be postponed until the children of a deceased child of the niece attain twenty-one, for the attainment by a child of the niece of the age of twenty-one, is stated to be the period at which the gift is to take effect." It was apparently overlooked that all the children of the niece might have died under twenty-one, and in that event a division could not be made, until at least some one grand-child reached twenty-one, which might be beyond the limits fixed by the rule against perpetuities. *See* also *Speakman* v. *Speakman* (1849), 8 Hare, 180; *Taylor* v. *Frobisher* (1852), 5 DeG. & Sm., 191; *Gooch* v. *Gooch* (1853), 3 DeG. M. & G., 366; *Baldwin* v. *Rodgers* (1853), 3 DeG. M. & G., 649. Cf. *Sandkuhl* v. *Nadhurst* (1901), 2 Ch., 338.

class; thus, where particular sums are given to each of the members of a class, the gift is good as to those members who are within the limits of perpetuity, as the amount of the gift to any one is not affected by the existence or non-existence of the others. Thus, in *Storrs* v. *Benbow*,[1] the bequest was of £500 to "each child that might be born to either of the children of either of the brothers" of the testator, to be paid to each at twenty-one; Lord Chancellor Cranworth held that this was not in reality a bequest to a class within the meaning of the rule in *Leake* v. *Robinson*,[2] but rather a bequest to such individuals as might at the testator's death answer a particular description; the gift was good, therefore, as to the children of the nephews who were in existence at the death of the testator, and bad as to all children born after his death.[3] Again, even if the amount payable to each legatee depends upon the number of legatees, the gifts are treated as independent if such number must of necessity be finally decided within the limits of the rule; thus, if the bequest is of a fund to be divided into as many shares as there are children of *A* surviving him, one share to be paid to each child for life, and upon his death to his children, such of these as were not born at the testator's death take nothing, but the children of those children of *A* who were born in

Storrs v. Benbow.

[1] (1853) 3 DeG. M. & G., 390; 22 L. J. Ch., 823.

[2] (1817) 2 Mer., 363.

[3] The same view had been substantially taken in 1844 by Vice-Chancellor Knight Bruce in *Boughton* v. *Boughton*, as appears from the decree in the cause set out in 1 H. L. C., 414. *In re Michael's Trusts* (1877), 46 L. J. Ch., 651, and *Buckton* v. *Hay* (1879), 11 Ch. D., 645, in which a contrary view had been taken were dissented from in *Herbert* v. *Webster* (1880), 15 Ch. D., 610. See *Krishanath* v. *Atmaram* (1891), I. L. R., 15 Bom., 543, where the benefit which each member of the class was to take, was residence in the family house; Sargent, C. J., held that the benefit which each member of the class was to take was in no way dependent on the number of the class, that each had a distinct and independent right of residence, and that the members of the class who were in existence at the death of the testator, were entitled to share in the benefit conferred on the class.

the testator's life-time will take the share in which their parent had a life interest.[1]

Difficulty of construction.

As I have already mentioned to you, considerable difficulty may sometimes be felt in deciding whether a particular gift is a gift to a class within the meaning of the rule. There are cases in the books which are not easily intelligible, and as the question is mainly one of construction of the bequest in each individual case, no useful purpose would be served if I presented you with a digest of the decisions on the point. I would only repeat and I would ask you never to forget that for the purposes of this rule, a class is constituted not with reference to what is the natural class, but with reference to what is the gift, that is, to whom the gift is made of a separate independent property. To take a very strong case, suppose the gift to be to *A*, *B* and the children of *C*, all strangers to the family of the testator, and no blood relationship or any sort of connexion whatever between *A*, *B* and *C*; clearly *A*, *B*, and the children of *C* do not form a natural class, but they constitute a legal class, a class to whom the gift is made and who are taken into consideration as a class in dealing with that gift.[2] When you have settled upon a construction of the disposition that the bequest is to a class in the legal sense, you must next determine whether the class may or may not be finally ascertained within the limits of perpetuity; if it may be so ascertained, the gift is good, if not the whole gift is void. Here, again, you may have to take note of well-settled canons of construction; for example, when a will contains an immediate gift to

[1] *Griffith* v. *Pownall* (1843), 13 Sim., 393.

[2] The case which may be most usefully consulted is *Knapping* v. *Tomlinson* (1865), 34 L. J., Ch., 3, where the earlier authorities were reviewed by Vice-Chancellor Kindersley. The case of *Greenwood* v. *Roberts* (1851), 15 Beav., 92, has been much discussed, and is not easy to reconcile with *Griffith* v. *Pownall* (1843), 13 Sim., 393; the decision has been attempted to be supported by Wood, V. C., in *Catlin* v. *Brown* (1853), 11 Hare, 372, by Kindersley, V. C., in *Knapping* v. *Tomlinson* (1865), 34 L. J. Ch., 3, and by Sir John Romilly, M. R., in *Webster* v. *Boddington*, each on a different ground. *See* 1 Jarman, 230; Marsden, 285.

the children of a living person and nothing more, and there are children living at the death of the testator, they alone take[1]; if, however, the period of distribution is postponed, say by the intervention of a life estate, the gift will apply not only to children living at the death of the testator, but will also take in after-born children who are alive at the time of distribution.[2] Thus, if the bequest be to such of the grand-children of the testator as reach twenty-five, and, if one or more of them have reached that age at the death of the testator, the first of these canons of construction shows that the class is closed and the devise is not too remote;[3] if, on the other hand, in the very same case, the gift to the grand-children had been preceded by a life estate, the rule in *Leake* v. *Robinson*[4] would obviously have been applicable.[5]

Summary of decisions.

Mr. Marsden has made a very useful summary of the cases in which the question of remoteness has arisen in connection with limitations to classes; I reproduce the list here with additions, showing the constitution of the class, the period at which it was ascertained, and its legal operation.

Instances of void limitations.

In the following cases the class has been held too remote and the limitation void.

(1) Gift to the children of *A*, a spinster, living when a daughter of *A* first attains twenty-four.[6]

(2) Gift to the children of *A*, a spinster, living at the death of the survivor of *A* and her future husband.[7]

[1] *Singleton* v. *Gilbert* (1784), 1 Cox., 68; *Viner* v. *Francis* (1789), 2 Cox., 190; *Davidson* v. *Dallas* (1808), 14 Ves., 576.

[2] *In re Emmet's Estate* (1879), 13 Ch. D., 484.

[3] *Picken* v. *Mathews* (1878), 10 Ch. D., 264. It must be remembered, however, that the bequest cannot take effect partially or by instalments so as to be valid as to that minimum amount or share to which every grand-child, attaining the specified age, must, at all events, be entitled, and void for remoteness as to anything accruing by survivorship.

[4] (1817) 2 Mer., 363.

[5] Cf. *Williams* v. *Teale* (1847), 6 Hare, 239.

[6] *Dodd* v. *Wake* (1837), 8 Sim., 615.

[7] *Lett* v. *Randall* (1855), 3 Sm. & G., 83.

(3) Gift to the brothers and sisters of *A* (who took a life interest) upon their respectively attaining twenty-five, or being sisters, marrying.[1] Void limitations.

(4) Gift to the testator's next of kin at the time of failure of children of unborn children of *A*.[2]

(5) Gift to the children of *A* living when the youngest attains twenty-five and the issue of children of *A* then dead.[3]

(6) To the children of *A* who attained twenty-one and the sons who attain twenty-one of such of the children of *A* as die under twenty-one *per stirpes*.[4]

(7) Gift to the testator's grand-children at (that is such of them as attain) twenty-one.[5]

(8) Gift to such of the four individuals *A*, *B*, *C*, *D* as shall be living at the death of the survivor of the testator's daughter and her future husband, and the children *per stirpes* who survive their parent of such of the four as shall then be dead.[6]

(9) Gift to *A B* and all other, the present and future children of *C* living at *C's* death who attain twenty-one or marry and the children, who attain twenty-one or marry, of such of them as die in *C's* life, *per stirpes*.[7]

(10) Gift to the testator's grand-children living at the death of the survivor of their parents.[8]

(11) Gift to the children of *A* attaining twenty-one and the issue attaining twenty-one or dying under that age, leaving issue of children of *A* dying under twenty-one *per stirpes*.[9]

(12) Gift to the issue of any present or future child of *A* who should die leaving issue and the surviving

[1] *Leake* v. *Robinson* (1817), 2 Mer., 363.

[2] *Hale* v. *Pew* (1858), 25 Beav., 335.

[3] *Read* v. *Gooding* (1856), 21 Beav., 478.

[4] *Seaman* v. *Wood* (1856), 22 Beav., 591.

[5] *Cromek* v. *Lumb* (1839), 3 Y. & C. Ex., 565.

[6] *In re Merrick's Trusts* (1866), 44 R., 1 Eq., 551.

[7] *Webster* v. *Boddington* (1858), 26 Beav., 128.

[8] *Buchanan* v. *Harrison* (1861), 1 J. & H., 662.

[9] *Pearks* v. *Moseley* (1880), 5 Ap. Cas., 714.

Void limitations.

children of *A* upon the death of any such child of *A* without leaving issue.[1]

(13) Gift to grand-children of *A* living at the death of such of the present or future children of *A* as should die last.[2]

(14) Gift to *A* and a remote class as tenants in common.[3]

(15) Gift to the children of *A*, a bachelor living at the death of his eldest son and the children *per stirpes* of such of the children of *A* as are then dead.[4]

(16) Gift to a class to be ascertained 50 years after the testator's death, consisting of children of the testator, their children and remoter issue.[5]

(17) Gift to children of *A* who attain twenty-five or being daughters marry.[6]

(18) Gift to the daughters of *A* and *B* his wife living at the failure of *C's* issue.[7]

(19) Gift to the next of kin of the testator to be ascertained at the death of his surviving grand-child.[8]

(20) Gift to such of the testator's children as should be living at the death of a child of the testator or failure of such child's issue, which should last happen, in the life-time of any husband or wife of the child and the issue (*per stirpes*) of such of the testator's children as should be then dead.[9]

(21) Gift to the children attaining twenty-two,[10] twenty-three,[11] twenty-four,[12] twenty-five,[13] of *A* or of the testator's sons or daughters.

[1] *Gooch* v. *Gooch* (1851), 14 Beav., 565.

[2] *Gooch* v. *Gooch* (1851), 14 Beav., 565.

[3] *Porter* v. *Fox* (1834), 6 Sim., 485.

[4] *Stuart* v. *Cockerell* (1870), L. R., 5 Ch. Ap., 713.

[5] *Speakman* v. *Speakman* (1849), 8 Hare, 180.

[6] *Griffith* v. *Blunt* (1841), 4 Beav., 248.

[7] *Jee* v. *Audley* (1787), 1 Cox, 324.

[8] *Hayes* v. *Hayes* (1828), 4 Russ., 311.

[9] *Hodson* v. *Ball* (1845), 14 Sim., 558.

[10] *Vawdry* v. *Geddes* (1830), 1 Russ. & My., 203; *Thomas* v. *Wilberforce* (1862), 31 Beav., 299.

[11] *Bull* v. *Pritchard* (1826), 1 Russ, 213.

[12] *Newman* v. *Newman* (1839), 10 Sim., 51. *In re Blakemore's Settlement* (1855), 20 Beav., 214.

[13] *Judd* v. *Judd* (1830), 3 Sim., 525; *Ring* v. *Hardwick* (1840), 2 Beav., 352; *Chance* v. *Chance* (1853), 16 Beav., 572; *Rowland* v. *Tawney*

(22) Gift to *A* for life and after his death to his descendants bearing a specified name for life.[1] Void limitations.

(23) Gift to the children of *A* who attain twenty-five except *X*, *Y* and *Z*.[2]

(24) Gift to the testator's children living, and the issue of such as should be dead upon failure at any time of issue of one of the testator's daughters.[3]

(25) Gift to all the testators' grand-children who attain twenty-four[4] or twenty-five.[5]

(26) Gift to the testator's grand-children living at the death of each of his present and future grand-children.[6]

(27) Gift to the child, if one only or to the children if more than one of *A*, who attain twenty-five and survive her; the gift being of a sum to be raised from and after a child attains twenty-five, and *A* being *enciente* at the testator's death of her only child who afterwards attains twenty-five.[7]

(28) Gift to such of the grand-children of the testator as her sister should by will appoint and as might be living when certain annuities and mortgages are paid off.[8]

(29) Gift to such of the nephews and nieces (named) of the testatrix as should be living twelve months after the death of *A* and the issue then living and who should attain twenty-one or marry, of such of the nephews and nieces as should be then dead *per stirpes*.[9]

(1858), 26 Beav., 67; *Boreham* v. *Bignall* (1850), 8 Hare, 131; *Blagrove* v. *Hancock* (1848), 16 Sim., 371; *Pickford* v. *Brown* (1856), 2 K. & J., 426; *Hunter* v. *Judd* (1833), 4 Sim., 455; *Bute* v. *Harman* (1846), 9 Beav., 320, where the marginal note is incorrect, the bequest having been held void for remoteness. *In re Morre's settlement* (1855), 21 Beav., 174.

[1] *Repington* v. *Roberts-Gawen* (1881), 19 Ch. D., 520.

[2] *Comport* v. *Austen* (1841), 12 Sim., 218.

[3] *Webster* v. *Parr* (1858), 26 Beav., 236.

[4] *Newman* v. *Newman* (1839), 10 Sim., 81.

[5] *Blagrove* v. *Hancock* (1848), 16 Sim., 371.

[6] *Coutier* v. *Oram* (1855), 21 Beav., 91.

[7] *Merlin* v. *Blagrave* (1858), 25 Beav, 125.

[8] *Blight* v. *Hartnoll* (1881), 19 Ch. D., 294.

[9] *Bentinck* v. *Portland* (1877), 7 Ch. D., 693; this is an example of a class-gift, where the shares are ascertainable as to their smallest but not as to their largest amount within the legal period.

(30) Gift to *A* for life, then his children successively for life and after the death of the survivor of *A* and her children, to *B* and her children for their lives in like manner and after the deaths of *A*, *B* and their children to the appointees by deed or will of the last survivor.[1]

Instances of valid limitations.

In the following cases the class has been held not too remote and the limitation valid :

(1) Gift to the great grand-children of *A* living when a child of *B* first attains twenty-one.[2]

(2) Gift to such of *A*'s children as shall attain twenty-five, *A* having died after the date of the will and before the testator.[3]

(3) Gift to the children of the testator's unmarried son and daughter and the issue of such of the children as should die before the death of the survivor of the son, daughter and son's future wife.[4]

(4) Gift to such of the testator's children living at his death as should attain twenty-two.[5]

(5) Gift to the grand-children of *B* living at the death of *A*, with a direction as to payment at twenty-five.[6]

(6) Gift to the children of *A* and *B* who attain twenty-five, there being a child of twenty-five at the testator's death.[7]

(7) Gift to the grand-children and great grand-children (*per capita* or *per stirpes*) of *A* living at the death of a child of *A*, which child was living at the testator's death.[8]

(8) Gift to the testator's cousins, living at his death or born before the death of his widow and the issue of

[1] *Midgley* v. *Tatley* (1890), 43 Ch. D., 401, where the gifts to the appointees were held void for remoteness. Compare *Ashley* v. *Ashley* (1833) 6 Sim., 358, where cross remainders amongst a class of unborn tenants for life were held good without discussion.

[2] *Packer* v. *Scott* (1864), 33 Beav., 511.

[3] *Southern* v. *Wollaston* (1852), 16 Beav., 166; *Williams* v. *Teale* (1847), 6 Hare, 239.

[4] *Goodier* v. *Johnson* (1881), 18 Ch. D., 441; here the gift was by way of an independent substitutionary gift for another which was void for remoteness.

[5] *Elliott* v. *Elliott* (1841), 12 Sim., 276.

[6] *Kevern* v. *Williams* (1832), 5 Sim., 171.

[7] *Picken* v. *Mathews* (1878), 10 Ch. D., 264.

[8] *Wetherell* v. *Wetherell* (1863), 1 DeG. J. & S., 134.

cousins dying in the widow's life, such issue taking *per stirpes* and by substitution.[1]

Instances of valid limitations.

(9) Gift to the present and future children of *A* with gifts over which are too remote, for example upon the death of a child under thirty to the survivors,[2] or upon the death of all the children under twenty-five.[3]

(10) Gift to *A* and *B* and all their children and their heirs for ever, that is, a gift to *A* and *B* and their children as tenants in common in fee.[4]

(11) Gift after the death of the survivor of *A* and *B* to the immediate or direct descendants of *A* or *B* bearing a specified name for life.[5]

(12) Gift of the proceeds of sale of real estate, directed to be sold upon failure or expiration of an estate-tail limited by the will, to the children of *B* other than *A* living at the failure or expiration of the estate-tail and the issue of such of *B's* children as should be then dead and the issue of *A*; with a substitutionary gift to their children of the shares of members of the above class who should die before the period of distribution.[6]

(13) Gift to the present and future children of *A* who should be living at the death of *B*, with a direction to settle the shares of the daughters upon them for life with remainder to their children.[7]

(14) Gift of £500 to each of the present and future children of the testator's present and future nephews and nieces.[8]

[1] *Baldwin* v. *Rogers* (1853), 3 De G. M. & G., 649.

[2] *Taylor* v. *Frobisher* (1852), 5 De G. & Sm., 191.

[3] *Hardcastle* v. *Hardcastle* (1862), 1 H. & M., 405.

[4] *Cormack* v. *Copous* (1853), 17 Beav., 397.

[5] *Repington* v. *Roberts Gawen* (1881), 19 Ch. D., 520.

[6] *Heasman* v. *Pearse* (1871), L.R., 7 Ch., 275.

[7] *Wilson* v. *Wilson* (1858), 28 L. J. Ch., 95, where the superadded condition was held void for remoteness except as to daughters born in the testator's life-time; *Herbert* v. *Webster* (1880), 15 Ch. D., 610; cf. *Arnold* v. *Congreve* (1830), 1 Russ. & My., 209, which can be no longer treated as law in so far as it decides that the gift over, in case of grand-children living at the testator's death, is invalid.

[8] *Storrs* v. *Benbow* (1853), 3 DeG. M. & G., 390.

as shall from time to time be Lord Vere," it being his intention that the chattels "shall go and be held and enjoyed with the title of the family, as far as the rules of law and equity will permit." *A* enjoyed the chattels and died leaving two sons, *B*, *C*, born before the testator's death; *B* enjoyed the chattels and died leaving a son *D*, born after the testator's death; *D* died an infant and unmarried. The question was whether the representative of *B* or of *D* was entitled to the chattels. Sir John Leach, V. C., who heard the cause in the first instance, held that *D* took a valid interest under the will, and his representatives were entitled to the chattels. This was confirmed on appeal by Lord Chancellor Lyndhurst; but the House of Lords, upon the advice of Lord Brougham, reversed the decree. You will see that there were two distinct questions in the case, namely, (1) did *D* take any interest under the will, (2) did *B* take any interest under the will. As to the first of these questions, it is clear that *D* did not take, for, although in the event which actually happened, the limitation to *D* took effect on the death of *B* who was alive at the death of the testator, it was quite possible that the successor of *A* might not have been born during the life of the testator, and the bequest on the death of such successor might not have therefore taken effect within the limits of the rule. It must be confessed, however, that though the House of Lords decided against the validity of *D's* claim, the reasons assigned by Lord Brougham would hardly bear close examination and, indeed, if those reasons were sound, they would, as Lord Brougham himself admitted, at once destroy the claim of *B* along with that of *D*.[1] As regards the second question, namely, whether *B* took under the will, the House of Lords did not decide the point; it may be pointed out however, that the limitation in favour of *B*, as the first member of the series, was valid; it was to take effect immediately on the death of *A*, and there is no reason

Tollemache v. Coventry.

[1] Sugden on Property, 339.

why the first Lord Vere after *A* should not take, because his successors could not take ;[1] in other words, the bequest in favour of the person who may from time to time be Lord Vere, was not a bequest to a class, but rather involved a succession of bequests, the first of which might take effect though the others were too remote. I must confess, however, that there has been considerable difference of opinion upon the point, and matters have been complicated by reference to what is called the "general intent" of the testator which it is, in many cases, next to impossible to ascertain. Thus, in *Ibbetson* v. *Ibbetson*,[2] the devise was of chattels to trustees, in trust to permit the same to be used by the person entitled for the time being to the possession of real estate under certain settlements, and to convey them absolutely to the first tenant in tail under the settlement who might attain twenty-one years ; it is manifest that a person of this description might not come into existence within the limits of perpetuity and the bequest was held void for remoteness. Again, in the very important case of *Dungannon* v. *Smith*[3] the bequest was of leaseholds upon trust for the grandson of the testator for life, with direction that after his death, the profits were to go to the person who for the time being would take by descent as heir male of the body of the grandson, and the leaseholds to be conveyed absolutely to the first of this series of persons who might attain twenty-one ; clearly, here also a person of this description entitled to take absolutely might not come into existence within the limits allowed by the rule, and the property might not vest for generations : the bequest, after the life estate, was, therefore, too remote and altogether void. In the actual event, the eldest son of the grandson had attained twenty-one during his father's life-time ; this,

Ibbetson v. *Ibbetson.*

Dungannon v. *Smith.*

[1] *See* the judgment of Mr. Justice Patteson in 12 Cl. & F., 593, and of Mr. Justice Parke in 12 Cl. & F., 608.

[2] (1840) 10 Sim., 495 ; 5 My. & Cr., 26.

[3] (1845) 12 Cl. & F., 546.

Dungannon v. Smith.

of course, was wholly immaterial, as the validity of the devise was to be tested not in the light of actual, but of possible events, and it was a pure accident that a person answering the description was in existence. Lord Chancellor Lyndhurst in moving the judgment of the House of Lords, said: "The disposition was to be to a person answering two descriptions; he was to be the heir male of the body taking by descent from the grandson, and he was to be of the age of twenty-one years. It is quite obvious that those two circumstances might not combine for many generations, and indeed it is possible that they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness." You will see, therefore, that all that it was necessary to decide for the purpose of these cases was to hold that the bequest was void for remoteness as the vesting might be delayed beyond the period allowed by the rule; for even admitting that the bequest in each instance was to a series, the entire bequest would necessarily fail, inasmuch as if it had been limited only to the first member of the series, it would have been obnoxious to the rule against perpetuities. These decisions, therefore, cannot rightly be regarded as authorities in support of the view that in the case of a bequest to a series, "if any one member of the series may be too remote, the limitation is altogether void."[1] Indeed, the opinions embodied in the several judgments in *Dungannon* v. *Smith*[2] are by no means easy to reconcile; but Mr. Justice Cresswell seems to point out the essence of the matter when he says that the question is, not whether if *A* or *B* took must take in due time, but whether the estate, if taken by any one under this bequest, must be taken in due time.[3] This does not seem to be inconsistent with the view that the bequest in favour of the first member of the series would be valid if it necessarily took effect within the limits of perpetuity. Lord Lyndhurst also accepted it as settled doctrine that

Cresswell, J.

[1] Mr. Marsden takes the opposite view, *see* p. 119.

[2] (1845) 12 Cl. & F., 546.

[3] (1845) 12 Cl. & F., 564.

if the first estate in the order of succession is not void for remoteness, if it is a good estate, it would not be affected by the fact of the successive estates being void on that account; but he went on to add that there was nothing to show that the testator in the case before him intended to make a grant of successive estates.[1]

The case of *Liley* v. *Hay*[2] also does not favour the more stringent view; in that case, there was a devise of real estate to trustees upon trust to distribute the rents among certain families whose names were mentioned; Vice-Chancellor Wigram held the devise good so far as the persons named were concerned, and added: "Where the will directs that the objects are to take in succession, there can be no reason why the devise is to be held void on the ground of perpetuity."[3] To take a case on the other side of the line, we may refer to *Wainman* v. *Field*,[4] where the devise was of freehold to *A* for life, remainder to *B* for life, remainder to *B's* first and other sons successively in tail male, and also of leasehold to trustees to pay the rents to the person entitled for the time being to the freehold, with direction to convey the same absolutely to him as soon as he became by good assurance seised of the land in fee simple in possession. Vice-Chancellor Wood held that the whole of the bequest after the life-estates was void for remoteness, as the freehold estates might travel through a long series of successive minorities for centuries. It is difficult to see, however, why the bequest should not take effect in favour of the first tenant in tail who must take upon the death of *B*; at any rate, the decision in *Dungannon* v. *Smith*[5] upon which reliance was placed, does not establish the invalidity of such a bequest, and is, in fact, distinguishable, inasmuch as the gift there in favour of even the first member of the series was void for remoteness.

Liley v. *Hay.*

Wainman v. *Field.*

[1] (1846) 12 Cl. & F., 625.

[2] (1842) 1 Hare, 580, 11 L. J., Ch., 415.

[3] Cf. *Dillon* v. *Reilly*, Ir. R., 10 Eq., 152.

[4] (1854) Kay, 507.

[5] (1845) 12 Cl. & F., 546.

Intention of grantor.

I have already mentioned to you that in some of the cases a middle course was adopted, and it was held that where the intention is clearly expressed that the bequest is to take effect only if all the members of the series may in succession enjoy the property for life, the entire bequest must necessarily fail if any member of the series is beyond the line of perpetuity; but if, on the other hand, the intention is clear that the bequest should operate in favour of such members only of the series as are within the line of perpetuity, such intention will be carried out. The tendency of the recent cases seems to be in favour of the more liberal view, and effect is given to the intentions of the testator so far as the law permits.[1]

Rules summarised in *Cattlin* v. *Brown*.

The leading propositions on the subject of limitations to a class and limitations to a series were thus summarised by Vice-Chancellor Wood in *Cattlin* v. *Brown*[2]:

(i) An executory devise is bad unless it be clear at the death of the testator, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years afterwards. *Dungannon* v. *Smith*.[3]

(ii) The objects of the testator's bounty must be ascertained by construing his will without any reference to the rules of law which prohibit remote limitations

[1] See *In re Johnson's Trusts* (1866), L. R., 2 Eq., 716. *Macworth* v. *Hinkman* (1836), 2 Keen, 658; 5 L. J. Ch., 127. Cf. *Fell* v. *Biddolph* (1875), L. R., 10 C. P., 701.

Where no question of remoteness arises, but a gift to a class fails as regards some of the members, the entire gift, it seems, does not fail; see *In re Coleman and Jarrom* (1876), 4 Ch. D., 165, in which case it was held that where there is a gift by a testator to a class, those members of the class who are at his death capable of taking, take the whole, the gift being construed as shewing an intention on the part of the testator that the class shall take so far as the law allows; Sir George Jessel, M.R., observed: "The testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take and his secondary intention is that if all cannot take those who can shall do so. The true rule is that those members of the class who are, at the testator's death, capable of taking, take, and those who become incapable of taking—whether by dying in the testator's life-time, or by attesting the will, or by some other operation of law—do not take."

[2] (1853) 11 Hare, 372.

[3] (1846) 12 Cl. & F., 546 (570).

and, after the will has been construed, the rules of law as to perpetuities are to be applied to the objects so ascertained.

(iii) If the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others. *Proctor* v. *Bishop of Bath and Wells*,[1] *Dungannon* v. *Smith*.[2] *Cattlin v. Brown.*

(iv) Where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. *Jee* v. *Audley*,[3] *Leake* v. *Robinson*,[4] *Gooch* v. *Gooch*.[5]

(v) Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, the gift may be good as to those within the limits allowed by law. *Storrs* v. *Benbow*.[6]

I now purpose to examine how far the principles we have hitherto explained are consistent with Hindu law and ought to be engrafted on that system. But before I do so, I ought to point out that the very stringent rule laid down in *Leake* v. *Robinson* has not, even in England, been regarded as the embodiment of good sense and wisdom. Indeed, Sir William Grant, M. R., in his judgment in that very case, observed that it would have been well if the Courts had originally held an *Leake v. Robinson.*

[1] (1794) 2 H. Bl., 358.
[2] (1846) 12 Cl. & F., 546 (574).
[3] (1787) 1 Cox., 324.
[4] (1817) 2 Mer., 363.
[5] (1851) 14 Beav., 565.
[6] (1833) 2 Myl. & K., 46.

executory devise transgressing the allowed limits to be void only for the excess where that excess could be clearly ascertained.[1] Similarly, in *Pearks* v. *Moseley*[2] Lord Chancellor Selborne said: "It may be that if *Jee* v. *Audley*, *Leake* v. *Robinson*, and a long series of cases which have followed them, had never been decided, the Courts might have reasonably wished, if they could, to find some means of modifying the application of the rule of remoteness, so as to preserve as much as possible of the intention of testators, and sacrifice only, if they could discover it, the real excess. But whatever one might have thought of the possibility of doing this, if the question had been entirely free from discussion, it has been long since settled and determined; and I apprehend that now no authority, less than that of the Legislature, can alter it." Lord Penzance added that the matter might very well have been debated a hundred years ago, and might be worthy of consideration now, if the question were one of legislation. This, at any rate, is warning of which we might well take heed; and you will not, therefore, be surprised to hear that the artificial rule which operates to exclude a whole class because the bequest to one member is tainted with the vice of remoteness, although made applicable by the Legislature to the limited class of cases to which Sec. 102 of the Indian Succession Act extends, and although applied in all its severity in some of the earlier cases in this country even where the bequest failed for reasons other than the vice of remoteness, has been, in later cases, practically regarded as inapplicable to dispositions by Hindus.

Pearks v. *Moseley.*

Bramamayi v. *Joges Chandra.*

One of the earliest cases in this country in which the question was raised is *Bramamayi Dasi* v. *Joges Chandra Dutt*.[3] There the testator, after giving life estates to his four sons and two grandsons, directed that upon the death of any of his sons without leaving male issue[4] "the share

[1] (1817) 2 Mer., 389; 16 R. R., 182.
[2] (1880) 5 Ap. Cas., 714, 726.
[3] (1871) 8 B. L. R., 400. *See* this case criticised by Wilson, J., in I. L. R., 12 Cal., 671 (1886).
[4] The words "male issue" were

of such son should belong to the survivors of the sons and grandsons for life, and their respective male issue absolutely after their death." The gift over was construed as a gift "to the surviving sons and the living male issue of the deceased sons as a class, the surviving sons to take for their lives, and the issue of the deceased sons absolutely." Of course, their male issue might include persons born after the death of the testator, and in respect of such unborn persons the gift was bad; it was held, therefore, that the entire gift over failed. Norman, C. J., after pointing out that the gift, so far as it was a gift to the unborn male issue of the sons and grandsons of the testator, must fail by reason of the rule that a gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator, cannot take effect, went on to observe: "It is a well settled rule in construing wills, founded upon excellent reasons, and which has been adopted in Sec. 102 of the Indian Succession Act, that where there is a gift to a class and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail."

A similar question was raised in a later case[1] which arose upon the construction of another clause in the will we have just considered. The testator after giving life estates to his sons and two grandsons directed that upon

Soudaminey v. Joges Chandra.

construed as equivalent not to "sons" but to "descendants issued from his loins."

[1] *Soudaminey Dossee* v. *Jogesh Chandra Dutt* (1877, I. L. R., 2 Cal., 262). The learned Judge distinguished the case of *Krishna Romani Dasi* v. *Ananda Krishna Bose* (1869, 4 B. L. R. O. C., 231, 279) on the ground that there the gift over, did not in terms comprehend a class of issue whom the first taker should leave surviving and held, that "B took nothing under the devises in the testator's will. And if the devises to the male issue are void, as including objects too remote or incapable of taking a benefit under this will, all limitations ulterior or expectant on such remote or invalid devises are also void for the reasons given in the case of *Proctor* v. *The Bishop of Bath* (1794, H. Bl., 358), such reasons being equally applicable to a Hindu as to an English testator, and such reasons would, of course, apply more strongly in a case where an object of the prior devise, as *B* in this case, actually came into existence."

the death of any of the life tenants "leaving lawful male issue, such male issue shall succeed to the share of their father, to be transferred to them on attaining the age of twenty-one years." At the death of the testator one of his sons *A* had a son *B*; but as *A* survived the testator, he might possibly have other children born after the death of the testator, and the bequest, so far as these unborn children were concerned, was, of course, void; it was consequently held, upon the authority of *Leake* v. *Robinson*, that *B* took nothing under the will as he was one of a class some members of which were incapable of taking under the testator's will. Pontifex, J., observed: "If any other sons had been born to *A*, they certainly would not have been capable of taking under the testator's will; and, in that case, it seems to me, it would not have accorded with the testator's intentions that *B* should take the whole of *A's* share to the exclusion of his brothers. The question of the testator's intention in such a case was well considered by Sir William Grant in *Leake* v. *Robinson*, and of course, the question of intention is the same whether a testator be English or Hindu." Of course, the fact that *A* never had any son other than *B* ever born to him, was wholly immaterial.

Kherodemoney v. *Doorgamoney.*

The same question was raised in the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee*[1] where the bequest was by the testator, "to the son lately born to *A* and to the son or sons that may hereafter be born to him;" it was held, upon the authority of the cases I have just referred

[1] (1878) I. L. R., 4 Cal., 455; *per* Garth, C. J., and Markby, J., affirming the decision of Pontifex, J. Mr. Justice Markby pointed out that the Judicial Committee in *Soorjee Money Dosse* v. *Dinobundhoo Mullick* (1862), 9 Moo. I. A., 123, by upholding a gift to sons, to go over, if any of them died leaving a son or a son's son "to such of my sons and my son's sons as shall then be alive," and by their subsequent approval of that case in *Bhooban Mohini Debya* v. *Hurrish Chunder Chowdhry* (1878), 5 I. A., 138; I. L. R., 4 Cal., 23, had not recognised the validity of a gift to a class including "son's sons, etc.," which might include unborn persons, and consequently the two decisions of the Privy Council referred to did not form any exception to or extension of the rule laid down in the *Tagore Case* (1872), I. A. Sup., 47.

to, that the gift was to a class, some members of which could not legally take and was consequently wholly void.

But, this course of uniform adherence to principles of construction borrowed from English law, principles which very often defeat the intentions of testators, and which would be wholly inapplicable to this country, but for the questionable assumption that rules of construction are the same for all testators, be they Indians or Englishmen, has been rudely disturbed by a recent decision of the Privy Council.[1] In that case *A*, his son *B*, and his grandson *C* were members of a joint Mitakshara family. As *B* was a man of profligate habits, *A* with a view to save the ancestral property from being wasted by the vices and extravagance of *B*, executed a deed of gift in favour of *C*, which provided that "*C* himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties." *B* was a party to this gift, and received substantial consideration for his consent to a total exclusion from the ancestral property; the deed was registered, and ostensible change of possession was effected by proper and necessary mutation of names in the revenue registers. Upon the death of both *A* and *C*, the properties were claimed by the mother of *C* as heiress; but the creditors of *B* impeached the legality of the settlement on the ground, among many others, that as the deed, which clearly contemplated benefits as well to *C* as to after-born sons of *B*, was inoperative in favour of unborn persons, it was inoperative even as regards *C*. The Judicial Committee held that the transfer was not void but took effect as a valid transfer to *C*; the whole of the judgment is well worth careful perusal, but I must content myself with quoting only one passage: "It is said that the gift is made to a class, and that inasmuch as some of the class are unable to take, none can take, and certain sections of the Indian Succession Act,

Bishen Chand v. *Asmaida Koer.*

Judgment of the Judicial Committee.

[1] *Rai Bishen Chand* v. *Asmaida Koer* (1884), L. R., 11 I. A., 164.

Bishen Chand v. *Asmaida Koer.*

1865, are invoked to give weight to this contention, the Legislature having thought fit to apply those sections to Hindu wills. Independently, however, of the distinction which may be taken between wills, the operation of which is suspended during the testator's life, and deeds which operate immediately, specially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. Section 102 lays down the rule that a bequest inoperative as to some of a class shall be void, not in all cases, but only when the bequest offends against the rules contained in Secs. 100 and 101, and the gift under consideration does not fall within either of these two sections. It may be that illustration (*b*) to Sec. 102 imports into India an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have—and it seems out of place as attached to a section intended not to define the word 'class,' but only to establish a special incident of gifts to classes—it is not made applicable beyond the two cases contemplated by Secs. 100 and 101. Assuming that the deed is intended to express a gift to the brothers of *C*, which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of that generation is the grandson *C*. He, therefore, is made to take by name and immediately and the possession and ownership are transferred to him. Is then the gift indisputably designed for him, wholly to fail, because the parties supposed that they could join with him, possible afterborn sons, who, if any had happened to be born, could not legally claim under a gift? Is *B* whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out? No doubt that,

on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of *B* by passing the property to his sons. That intention is much more readily effectuated by giving the property to *C*, the only then son of *B*, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of the mother of *C* did not operate any change at all.

"Cases are not rare, in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that if *C's* possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present and able to receive the gift. He is an individual designated in the deed; if the deed stood alone, it is a question in each case whether a designated person, who is coupled with a class described in general terms, is merged into that class or not, but the deed did not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in India. *C* is entered in the Collector's books as the sole possessor of property, and his guardian takes possession, first, in his name and afterwards as his successor. The circumstance, that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed and is clearly proved from the transfer of the property in fact. But it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift. The High Court viewed it in the light of a partition. It cannot be strictly a partition, for according to the Mitakshara[1] there can be no partition directly between

[1] Chap. I, sec. 5, Verse 3.

Bishen Chand v. *Asmaida Koer.*

grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition, that *B* receives a portion and is thenceforth totally excluded, and *quoad ultra A* surrenders his interest to his grandson, who, on a complete partition among the whole family, would be entitled to one-fourth. Now, in such an arrangement, it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed, in the case of a partition between father and sons, it is laid down in the books, that if a son, born after the partition of ancestral estate, does not, out of the residue of his father's estate, get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga,[1] which is a Bengal authority, but it refers to Vishnu and Yajnya Valkya, authorities on which the Mitakshara is founded. Indeed the principle of the joint family is not less closely but more closely insisted on by the Benares school than by the Bengal school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between his heirs on the one hand, and his brothers, if any should be born, on the other. They are only shewing, that the notions present to the mind of the head of a joint Hindu family who is making a family arrangement are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

Ramlall Sett v. *Kanailall Sett.*

It is somewhat difficult to say from this judgment what was the precise ground of the decision of the Judicial Committee, whether, in fact, their Lordships intended to lay down that the rule in *Leake* v. *Robinson* was inapplicable to this country, or whether the decision was mainly based upon the special and peculiar circumstances of the case. The whole question, however, was elaborately

[1] Chap. VII, secs. 10, 11, 12.

discussed by Wilson, J., in a later case[1] where the testator had by a deed of gift conveyed certain properties to two of his grandsons and to any brothers of those two who might be subsequently born; the deed further provided that the existing grandsons should take possession of the property and have their names registered in the Collectorate, but that the rights and interests of their brothers who might be born in the future, should in no way be extinguished. In the face of the Privy Council decision, the conclusion was inevitable that the gift was good as to the living grandsons though inoperative as to their unborn brothers. The true ground of the decision of the Judicial Committee was stated to be that "in construing family settlements, Courts are to ascertain the real meaning of the parties to the transaction, that when that meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part." You will not fail to observe that the case before the Privy Council and the case before Mr. Justice Wilson were cases of gift under a deed, and, in each case, the gift failed partially not because it was tainted with the vice of remoteness, but because it was to persons who were incapable of taking under the Hindu law. Mr. Justice Wilson, however, after referring to the earlier cases in Calcutta went on to add that the principle of construction adopted by the Privy Council justified the inference that where there is a gift to a class, some of whom are or may be incapacitated from

Ramlal v. *Kanailal.*

[1] *Ramlal Sett* v. *Kanailal Sett* (1886), I. L. R., 12 Cal., 663, *per* Garth, C. J., and Wilson, J., reversing the decision of Pigot, J. In the earlier case of *Cally Nath* v. *Chunder Nath* (1882), I. L. R., 8 Cal., 378, the testator made a bequest to his grandsons, subject to life interests and annuities and other charges created by the will; he named two grandsons and spoke of others "whose names will be mentioned hereafter;" there were in fact, six grandsons born in the testator's life-time. It was contended, that this was a gift to grandsons as a class, and that as some of the class might not be born until after the testator's death, the entire gift was void. Garth, C. J., and Pontifex, J., upheld the view of Wilson, J., that the gift was to grandsons living at the testator's death only and was good as giving absolute estates to the living grandsons.

Ramlal v. *Kanailal.*

taking because not born at the date of the gift or the death of the testator as the case may be, and, where there is no other objection to the gift, it enures for the benefit of those members who are capable of taking. These observations clothed in extremely guarded language, and wholly unnecessary for the purposes of the case in which they were made, have been treated as authority for the proposition that the principles laid down by the Privy Council, apply not only to cases where there is a present gift to a living designated individual capable of taking, followed by actions of a kind which even without a deed work a transfer of property in this country, but also to cases in which there is a contingent gift to a class of persons to be ascertained at a future period.[1] But I am not

[1] The questions discussed above have been raised in several cases in Bombay. In *Jairam* v. *Kuverbai* (1885), I. L. R., 9 Bom., 491, a gift over, in a will in favour of the children of the surviving brother of the testator, was held void as a gift to a class which might include unborn persons. In *Krishnanath* v. *Atmaram* (1891), I. L. R., 15 Bom., 543, where a right of residence was given to a class some of whom were not entitled to take, Sargent, C.J., and Bayley, J., held that the benefit which each member of the class took was in no way dependent on the number of the children, but that each had a distinct and independent right to reside in the house, and that consequently the plaintiffs who were born in the testator's life-time were entitled to succeed.

In *Mangaldas* v. *Tribhuvandas* (1891), I. L. R., 15 Bom., 652, a gift in a will to a person who survived the testator, and after his death, "to his sons and daughters who may be alive" was upheld by Farran, J., in favour of one alive at the testator's death upon the authority of *Sett's Case* (I. L. R., 12 Cal., 663). In *Tribhuvandas* v. *Gangadas* (1893), I. L. R., 18 Bom., 7, Starling, J., held, that in the case of a gift to a class, if there is a person in existence at the time of the gift capable of taking and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence, whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift. In *Krishna Row* v. *Bena Bai* (1895), I. L. R., 20 Bom., 571, Farran, C. J., and Strachey, J., held in favour of the validity of a gift over to son's children living at the death of the testator as regards those members of the class who were capable of taking. In *Khemji* v. *Morarji* (1897), I. L. R., 22 Bom., 533, where Tyabji, J., had to consider the validity of a bequest to sons, daughters and widows of deceased sons of the testator, he held, that the gift was to a class of which some members were not in existence at the time of the testator's death, and consequently that the

aware of any decision in which the doctrine of *Leake* v. *Robinson* has been repudiated when the gift to a class fails as regards some of the members by reason of the Rule against Perpetuities.[1]

Bombay cases.

whole gift was void. It was pointed out that the primary duty of the Court was so to construe the will, as to carry out, as far as possible, the intentions of the testator, and that if the Court comes to the conclusion that the testator had the primary intention of benefitting all the members of a class, and if such intention fails by reason of its being void, yet if the Court can deduce a secondary intention, that at least such members of the class should take, as were in existence at the time of the testator's death, then effect should be given to such secondary intention but not otherwise. Cf. *Javer Bai* v. *Kabli Bai* (1890), I. L. R., 15 Bom., 326 (334). In Madras, the leading decision is *Manjamma* v. *Padmanabhayya* (1889), I. L. R., 12 Mad., 393, where it was held, that in the case of a gift to a class of persons to be ascertained at the death without issue of *A* who took only a life estate, the gift took effect, as regards a person, living at the death of *A* without issue, even though, the gift-over to his possible brothers might have been inoperative. Cf. *Srinivasa* v. *Dandayudapani* (1889), I. L. R., 12 Mad., 411, where a gift of a fund to a daughter, for life and to transmit the corpus intact to her male descendants was held not to be a gift to the male descendants as a class, but to give the daughter, a daughter's estate, to devolve upon her male descendants. *See* also *Chekkonekutti* v. *Ahmed* (1886), I. L. R., 10 Mad., 196, where a gift, to take effect, at an indefinite future time, was held void under the Mahomedan Law. In Calcutta, the observations of Wilson, J., quoted above (p. 177) have been applied to the case of a testamentary gift; see *Bhoba Tarini* v. *Peary Lall* (1897), I. L. R., 24 Cal., 646 (660). In a recent case before Mr. Justice Stanley, *Rojomoyee* v. *Troylucko Mohiney* (1901), 6 C. W. N., 267, it was held upon the authority of *Leake* v. *Robinson* (1817), 2 Mer., 363; *Pearks* v. *Moseley* (1880), 5 A. C., 714; and *In re Dawson* (1888), 39 Ch. D., 155, that where a gift is made to a class of persons some of whom are incapable of taking, the disposition fails as to all and that the rule applies, even though all the members of the class are born before the gift takes effect, if it was antecedently possible, that they might not have been so born, inasmuch as, the fact, that the gift might have included objects too remote, is fatal to its validity, irrespective of the actual event. The cases reported in I. L. R., 12 Cal., 663; and I. L. R., 22 Bom., 533, were apparently cited in argument but were not noticed by the Court.

[1] Reference may usefully be made to two recent decisions of the Judicial Committee which have some bearing upon the questions discussed above. In the first of these cases, *Tarakeswar Roy* v. *Sosi Sekhareswar* (1883), 10 I. A., 51; I. L. R., 9 Cal., 952, the Courts were called upon to construe the will of a testator who had given certain properties to his brother's three

Summary.

Let us now take a retrospect, so that we may be sure of the actual position :

(i) In cases where sec. 101 of the Indian Succession Act and sec. 14 of the Transfer of Property Act apply, if a future interest in favour of a class fails by reason of remoteness as regards some of the members of the class, the interest fails as regards the whole class. This is in accordance with *Leake* v. *Robinson*.[1]

(ii) Even in cases governed by the Indian Succession Act and the Transfer of Property Act, if a future interest in favour of a class fails as regards some of its members, neither by reason of its remoteness, nor by reason of its being obnoxious to the rule laid down in sec. 100 of the Indian Succession Act and sec. 13 of the Transfer of Property Act, the interest does not necessa-

sons, their sons, grandsons and other descendants in the male line, and had directed, that if "any of them die without leaving a male child, his share shall devolve on the surviving nephews and their male descendants and not on their other heirs." It was contended that the gift over was a gift to a class, composed of the surviving nephews and the descendants of deceased nephews and that, as some of the descendants of deceased nephews might be born after the testator's death and might consequently not be legitimate objects of gift, the gift over was wholly void as to all the intended objects. The Judicial Committee however held, that the phrase "any of them" meant any of the three nephews, not any of their descendants, and that on the death of any of the three nephews, his share shall go to the surviving nephews or nephew and not to the descendants of a dead nephew. According to the construction thus adopted, the gift over was to persons alive and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent according to the authority of *Soorjee Monee's Case* as explained in the *Tagore Case*.

In the second case which came before the Judicial Committee, *Rai Kishore Dasi* v. *Debendra Nath Sarkar* (1887), 15 I. A., 37 ; I. L. R., 15 Cal., 409, there was a gift over to surviving brothers with a direction that the sons of a predeceased brother or brothers should stand in the place of their fathers; it was held, that these were two separate provisions; and that consequently in regard to the share of a brother dying, where there are no sons of a predeceased brother in existence, there was a valid gift over to survivors, even assuming that the second provision would have been void as being a gift to a class, some members of which might be qualified to take while others might not be so qualified.

[1] (1817), 2 Mer., 363.

rily fail as regards the whole class. This is in accordance with *In re Coleman and Jarrom*.[1] Summary.

(iii) In cases not governed by the Statutory law just referred to, the limits of the Rule against Perpetuities have not yet been judicially determined with precision. When a rule of remoteness applicable to such cases comes to be definitively settled, it is doubtful whether there will be attached to it as rider any such inflexible rule of construction as is embodied in *Leake* v. *Robinson*.[2] The policy of that rule has been questioned by high authority in England, and the reasons on which it is avowedly grounded, do not apply to the habits and customs of the people of this country.[3]

[1] (1876), 4 Ch. D., 165.

[2] (1817), 2 Mer., 363.

[3] The reason for the rule in England is very clearly stated in *Leake* v. *Robinson* in a passage which was adopted by Lord Chancellor Selborne in *Pearks* v. *Moseley* and which has been quoted above (*see* p. 143). Mr. Justice Wilson, referring to these remarks, said: "These words were used in England, a country in which the nearest relatives are separate in property, in residence, and in all the details of life; one brother is no more affected by a gift to another brother than by a gift to a stranger, and, there is all the difference in the world between a gift to all the members of a class and a gift to some of them. But with Hindus the joint family state is the normal state; separate property is the exception. Even where individual members of a family have separate property, they may and generally do continue to live together joint in food and worship, and joint as to their inherited property. Moreover, there are also ordinarily in or attached to the family a number of dependent members and even dependents not strictly members of the family. This is the state of things which every Hindu settlor and testator contemplates as existing and desires to perpetuate. To people living in such family communities, the language of Sir William Grant seems to me by no means appropriate. It may make and perhaps generally does make comparatively little difference whether the title to property is vested in a large or smaller number of the members of the family. The difference would certainly not be such as to warrant the use of the expression, 'a new will' in the same sense as in England." I. L. R., 12 Cal., 683. *See* also p. 678, where Wilson, J., points out that rules of construction borrowed from English law ought not to be indiscriminately applied to people whose habits of thought and modes of expression are radically different. The Judicial Committee observed in the case of *Hunooman Prosad* v. *Babooee Munraj* (1856), 6 Moore's I. A., 411, that "deeds and contracts of the people of India ought to be liberally construed. The form of expression

Summary.

(iv) In cases not governed by the Statutory law, when a gift to a class fails in respect of some of its members for reasons other than remoteness, there does not seem to be any good ground why an artificial rule of construction should be imported to defeat the intentions of the donor; such intentions, wherever they may be fairly ascertained, ought to be carried out as far as the law allows. *Bishen Chand* v. *Asmaida Koer*.[1]

the literal sense is not to be so much regarded as the real meaning of the parties which the transaction discloses." These observations, however, have been only too often forgotten or ignored.

[1] (1884), 11 I. A., 164; I. L. R., 6 All., 560.

LECTURE VIII.

The Rule against Perpetuities as it affects Powers.

In the present lecture, I purpose to examine the operation of the Rule against Perpetuities upon powers. It would be impossible within the scope of a single lecture to place before you an elementary exposition of the doctrine of powers in its manifold applications, and any such extended enquiry would, indeed, be foreign to our present purpose ; we must, therefore, limit ourselves to a statement and illustration of the leading principles which govern questions of remoteness in powers. Besides, you will find that the principal questions which arise in this department of our subject have not, to any appreciable extent, received the benefit of judicial exposition in this country, and, as pointed out by the Judicial Committee in a recent case,[1] the English law of powers is not fit to be applied generally to Hindu Wills. It therefore, seems desirable to confine ourselves to an examination of such only of the leading principles of the subject as do not owe their origin to any very special or technical features of English jurisprudence. Preliminary observations.

A power has been defined as an authority reserved by, or limited to, a person to dispose of, either wholly or partially, property either for his own benefit or for that of others[2] ; the word is used as a technical term and

[1] *Motivahoo* v. *Mamoobai* (1897), 1 C. W. N., 366; I. L. R., 21 Bom., 709 : 24 I. A., 93.

[2] "A power of appointment is a power of disposition given to a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument." *Per* Sir George Jessel, M. R., in *Freme* v. *Clement* (1881), 18 Ch. D., 499 (504).

Definition of power.

must be distinguished from the dominion which a man has over his own property by virtue of ownership. Powers must, further, be distinguished from trusts. In the language of Chief Justice Wilmot, powers are never imperative, they leave the act to be done at the will of the party to whom they are given; trusts are always imperative, and are obligatory upon the conscience of the party intrusted. Powers and trusts, are, however, occasionally so blended, and partake so much of the nature and qualities of both that it may be difficult to say under which category a particular disposition ought to be placed; judicial decisions, have, therefore, established an intermediate class called powers in the nature of trusts.[1]

Power how vitiated.

A power may be void for remoteness by reason of the existence of one or more of several circumstances. In the first place, a power is bad, the scope and purpose of which is to create a perpetuity or to render property inalienable beyond the term allowed by law. In the leading case upon the subject, *Duke of Marlborough* v. *Lord Godolphin*,[2] the devise was of real estates to several persons for life, with remainders to their first and other sons in tail male successively; the testator further empowered and directed his trustees, upon the birth of every son of each tenant for life, to revoke the uses therein limited to their respective sons in tail male, and to limit the estates to such tenant in tail for his life, with remainder to his sons in tail. Lord Northington held that the power to revoke was void as tending to a perpetuity.

In the next place, if a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad. This may happen in various ways. For instance, if the donee of the power may have to be ascertained at a remote period, a power exerciseable by such a person, is invalid. Or, if the subject-matter in respect of which

[1] *Harding* v. *Glyn* (1739), 2 W. & T. L. C., 335.

[2] (1759), 1 Eden, 404.

the power is to be exercised may not come into existence within the limits of time prescribed by the rule, the power would be bad. Briefly speaking, if the occasion on which the power can be exercised may fall beyond the limits of the rule, whether by reason of the nature of the subject-matter, the object or the duration of the power, it is void for remoteness. But, when either the donee of the power or the occasion for its execution is confined in terms within the limits of the rule, the power is valid. Thus, a power given to the unborn child of a living person is too remote, as its effect is to tie up the property and render it incapable of disposition during the whole life-time of such child[1]; in fact, as Lord Chancellor Selborne pointed out, the effect is precisely the same as if there had been a gift to the unborn child for his own benefit dependent upon a condition that could only be ascertained at the moment of his death, which would be clearly beyond the permitted limit of time.[2] If, however, the unborn child has a general power, that is, a power which the donee can exercise in favour of any person he pleases, he may appoint to himself or to his own executors and administrators[3]; he has, consequently, absolute control over the property, and such a power, being, as Lord St. Leonards puts it, in the nature of property, does not fall within the mischief of the rule.[4] But if the exercise of such general power is made conditional on the consent of some

Power how vitiated.

[1] *Wollaston* v. *King* (1868), L. R., 8 Eq., 165.

[2] *Morgan* v. *Gronow* (1873), L. R., 16 Eq., 1 (10). It will be remembered, of course, that under the English law, if a life or lives in being is not taken as part of the period during which vesting is postponed, the other portion, namely, twenty-one years cannot be exceeded; thus limitations which may possibly take effect beyond twenty-one years from the instrument coming into operation are void for remoteness. *Palmer* v. *Holford*, 4 Russ. (1828), 403; *Speakman* v. *Speakman* (1849), 8 Hare, 180.

[3] *Irwin* v. *Farrer* (1812), 19 Ves., 86; *Mackenzie* v. *Mackenzie* (1851), 3 Mac. & G., 559.

[4] Sugden on Powers, 683; *Bray* v. *Bree* (1834), 2 Cl. & F., 453; see *Cooke* v. *Cooke* (1887), 38 Ch. D., 202, where it was held that in the case of a voidable settlement, subsequently confirmed, the period from which the rule is to be reckoned runs from the date of the deed.

other person or contingent on the happening of some possibly remote event, the power is bad.[1]

Goodier v. Johnson.

As an illustration of the way in which remoteness of the subject-matter may vitiate a power, we may take the case of *Goodier* v. *Johnson*[2]; there the testator directed his trustees, after the death of the longest liver of his son, his daughter and any widow whom the son might leave, to sell his estate and apply the proceeds for certain specified purposes; as the trust itself was void for remoteness, the gift of the sale-proceeds which were not ascertainable within the limits of the rule, was also invalid. Similarly,

Blight v. Hartnoll.

in *Blight* v. *Hartnoll*[3] there was a direction for the sale of a property after certain incumbrances subsisting thereon had been discharged (which might possibly happen beyond the time limited by the rule), and for the distribution of the proceeds among such of the grand-children of the testator as might be living at the time of the sale in such proportions as his daughter should by will appoint. The bequest was void as well because the class to take as the subject-matter, might not be ascertained within the limits of the Rule against Perpetuities.

Separable limitations.

You will remember that in a previous lecture, I explained to you the principle of separable limitations, and pointed out that unless a settlor or testator has himself separated the contingencies, the Courts will not split the gift for him. The same question often arises in reference to the separableness of powers and is governed by similar rules; that is to say, when a testator or settlor has given distinct powers to distinct persons, one may be good and another bad for remoteness; but if he has not himself separated the powers, the Courts will not

[1] See *Morgan* v. *Gronow* (1873), L. R., 16 Eq., 1, where the power was exerciseable upon marriage, and Lord Selborne said: "Marriage in the case of an unmarried and unborn child is an event as uncertain with regard to the time at which it may take place, if it ever does take place, with reference to lives in being as death is." *See* also *Webb* v. *Sadler* (1872), L. R., 14 Eq., 533; L. R., 8 Ch. Ap., 419.

[2] (1881), 18 Ch. D., 441.

[3] (1881), 19 Ch. D., 294.

undertake to do it for him. This rule, though simple in theory, may, as in the case of direct limitations, lead to considerable difficulty in application, which may be illustrated by the instructive case of *Attenborough* v. *Attenborough*.[1] In that case, the testator devised property to *A*, his heirs, executors and administrators upon trust to divide it into moieties and to pay the income of one moiety to *A* for life, with a direction, out of such moiety to set apart a sum of £5,000 to be held by trustees upon trust for *B* or such of his children as to *A* might seem meet; and, when *A* and all his children should be dead, the above sum to be subject to the same trusts as the other moiety. The testator appointed *A* his sole executor, and the will contained a power to fill up vacancies in the trusteeship. It was contended that the power was void for remoteness, but Vice-Chancellor Wood observed: "As regards the creation of the power and the persons in whom it is vested, it is to be exercised by *A*, the testator's brother or other, the trustees of this will; I think it may properly be divided and considered as two distinct powers, one vested in *A* and the other in the persons coming in as his successors in the trust under this will. Therefore, *A*, the brother, is a person who clearly has a right to make a valid appointment, whatever might be said if any succeeding trustee had attempted to exercise this power."

Attenborough v. *Attenborough*.

The question has sometimes been raised whether a power which tends to a perpetuity and cannot be sustained to the full extent, is void in its entirety. It may now be accepted as settled law, though there are dicta of eminent Judges to the contrary, that a power, bad for remoteness, must fail as a whole, unless it is separable. Lord Chancellor Eldon remarked in *Ware* v. *Polhill*[2] that if a power is bad to the extent in which it is given, you cannot model it to make it good. The question was elaborately discussed by Vice-Chancellor Wigram in *Ferrand* v. *Wilson*,[3] where that learned Judge observed: "If the will of the

Ware v. *Polhill*.

[1] (1855), 1 K. & J., 296.
[2] (1805), 11 Ves., 257; 8 R. R., 144.
[3] (1845), 4 Hare, 344; 15 L. J., Ch., 41.

Ferraud v. Wilson.

testator did, in effect, resolve itself into a single intention that a particular act shall be done, or a particular limitation shall take effect at a period which may possibly be more remote than the law allows in favour of a party designated, it is obvious that the Court may not be able to model the power, and at the same time give effect even in part to the actual intention of the testator ; but if the mind of the testator be, that successive acts shall be done from year to year, commencing with the year after his death, and if each of these acts be complete in itself, and, if each act is an exact fulfilment, as far as it goes, of the intention of the testator, both as to the thing done and the parties to be benefited by it, why should not a court of justice sustain such a power, so long as the exercise of it, determined by events as they stand at the death of the testator, will not be affected by the law against perpetuities, and hold the power void only for the excess. The will of the testator is lawful at its commencement, and continues so from day to day during all the acts provided to be done, and until it becomes unlawful only by being carried beyond the period allowed by law." This result, amply supported by authority, is based on sound principle, for, in order to the vesting of an interest under a power, the exercise of that power is a condition precedent, and if such exercise may take place beyond the limits prescribed by the rule, the whole interest is too remote and fails. If we fix any arbitrary limits and say that the power though tainted with the vice of remoteness, is good if it is actually exercised before something happens, it will lead to the utmost uncertainty in the application of the rule, and land us in hopeless difficulty.[1]

[1] In *Wood* v. *White* (1839), 4 Myl. & Cr., 460 (482); 8 L. J. Ch., 209, Lord Chancellor Cottenham, after holding that a particular power of sale was valid, went on to add that "if it were otherwise, the sale in question is within the permitted period and there would not be much doubt of its validity, until the expiration of that period." This dictum can hardly be considered as good law. Indeed, Lord Langdale, M. R., who heard the case in the first instance had

Power not bad by reason of possible appointment being too remote.

To the rule I have just explained, namely, that if a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad, we have the necessary corollary that a power which cannot be exercised beyond the limits of the Rule against Perpetuities, is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. Thus, for instance, a general power to an existing person to appoint to children, grandchildren or issue, without expressing the time within which they must be born, is good, for the donee of the power may appoint to such issue as are within the line of perpetuity ; in other words, it does not follow that because the original power might have been badly exercised, yet, if it is exercised so as not to infringe the rule, the mere possibility of its being exercised in another way, would make the power void.[1] This, of course, must be carefully distinguished from the rule that if the exercise of a power is made contingent upon an event which may, by possibility, happen beyond the limits of the rule, the mere fact that the contingency has actually happened earlier and thus rendered the exercise of the power practicable within the prescribed limits, does not validate the power ; for in such a case, the power is bad in its very inception, and subsequent events cannot make it good. To take an illustration : if the power of selection is exclusive, that is to say, if it is a power of appointment among a class, which authorises the donee to select one or more of such class to the exclusion of the others, the power will not fail simply because a remote appointment may possibly be attempted under it. On the other hand, if the power of distribution be non-exclusive, that is to say, if it be a

intimated serious doubts "whether the power might not be void *ab origine*, either as tending to a perpetuity or being incapable of being modelled and distributed." (7 L. J. Ch., 203 ; 4 Myl. and Cr., 471 ; 2 Keen, 664).

[1] *Stark* v. *Dakyns* (1874), L. R., 10 Ch. Ap., 35. Cf. *Motivahoo* v. *Mamoobai* (1897), 1 C. W. N., 366 ; *see* also *Hockley* v. *Mawbey* (1790), 1 Ves., 150 ; *Routledge* v. *Dorril* (1794), 2 Ves., 357 ; *Attenborough* v. *Attenborough* (1855), 1 K. & J., 296.

power which authorises the donee to distribute the property among the class in such shares and proportions as he pleases, but not so as to exclude any object entirely, the power is void if the final determination of the class might possibly be postponed beyond the period fixed by the Rule against Perpetuities.[1] The essence of the distinction is that in the one case the appointment may not possibly be, in the other case it must necessarily be obnoxious to the rule.[2]

In addition to the two rules I have just stated with reference to the creation of powers, namely, that a power which can be exercised at a time beyond the limits of the Rule against Perpetuities is bad, but that a power which cannot be so exercised is not rendered bad by the fact that within its terms an appointment could be made which would be too remote, you will have to bear in mind another very important rule which relates to the execution of powers. It is treated as a fundamental principle in the decision of questions of remoteness in powers, that the remoteness of an appointment depends on its distance, not from the exercise but from the creation of the power. If the rule were otherwise, the operation of the Rule against Perpetuities might be evaded in every instance under the cloak of a power. From this it follows that no estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power.[3] This doctrine

Remoteness of appointment dates from creation of power.

[1] Chance on Powers, § 323.

[2] The decision of Vice-Chancellor Shadwell in *Thomas* v. *Thomas* (1844), 14 Sim., 234, is inconsistent with these principles, and its correctness has been questioned. Lewis on Perpetuity, Sup., 166. *See* also *Griffith* v. *Pownall* (1843), 13 Sim., 393.

[3] Sugden on Powers, 396. *Robinson* v. *Hardcastle* (1788), 2 T. R., 241; 1 R. R., 467, 474, where Buller, J., said: "I take it to be a clear rule of law on the execution of a power, that the execution must have a reference to the power itself, and that a person claiming under the execution, takes under the deed by which the power is created; and therefore that the uses limited by the power must be such as would have been good if limited by the original deed." *See* also *Bristow* v. *Warde* (1794), 2 Ves., 336; *Crompe* v. *Barrow* (1799), 4 Ves., 681; *Brudenell* v. *Elwes* (1801-2), 7 Ves., 382; *Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D., 172.

is, however, sometimes stated in language which may prove misleading. It is said that the test of the validity of the estates raised is to place them in the deed creating the power, in lieu of the power itself [1]; of course, this does not mean that when you apply the test you are to import or read into the instrument by which the power was created, the identical language employed in the instrument by which the power is exercised; that would evidently lead to many absurdities, from an inappropriate application of language to events which, at the date of the execution of the power had already happened though they were contemplated as future at the time of the creation of the power.[2] In other words, the statement that "the appointment must be read into the original instrument" is strictly true if it refers to the validity of the appointment and not to the meaning of the words used.[3] What the rule requires is, that no appointment under a power is good, unless it was certain at the time of the creation of the power that if the appointment was ever made, the interest of the appointee would vest, if at all, within twenty-one years after lives then in being. Similarly, in this country, wherever the Hindu law is applicable, no appointment under a power is good, unless the estate limited is such as might have been validly conferred under the Hindu law by the donor himself under the deed creating the power.[4]

Appointment read into original instrument.

[1] Lewis on Perpetuity, 488. *Harvey* v. *Stracey* (1852), 1 Drew., 73; 22 L. J. Ch., 23.

[2] It follows therefore that where a power is created by will, which takes effect not from its date but from the death of the testator, the appointment must be read as if inserted in the will at the latter period. See *Devonshire* v. *Cavendish* (1782), 14 T. R., 741; *Peard* v. *Kekewich* (1852), 15 Beav., 166; *Wilkinson* v. *Duncan* (1861), 30 Beav., 111.

[3] It would be erroneous to refer to the creation of the power not only to determine the validity of the appointment but to determine the meaning of the appointing instrument; we have to consider, what the words of the appointment mean, as used by the donee of the power, and not what they would have meant, if used by the creator of the power.

[4] Cf. *Tribhuvandas* v. *Gangadas* (1893), I. L. R., 18 Bom., 7, where Starling, J., held, that in view of a direction in a will, that a deed was to be executed which

Harvey v. Stracey.

To illustrate this principle, suppose a fund settled in trust for *A* for life, and after his death, in trust for such of his children as he should by will appoint; *A* appoints, by will, equally among such of his children as, being sons, should attain twenty-one or being daughters should attain twenty-one or marry under that age; *A*, then, dies leaving several infant children. The appointment is perfectly valid under the English law, as the estates limited to the children are such as, if they had been created by the settlor himself, would not have been obnoxious to the Rule against Perpetuities; the interests of the appointee will vest within the period limited by the rule, as *A* was alive at the creation of the trust. Again, suppose a fund is devised in trust for *A* during his life and after his death in trust for such of the children of *B* as *C* should by will appoint. *C*, by his will, appoints the fund in equal shares to such of the children of *B* as shall be living at the death of *A*; *C* then dies in the life-time of *A*. The appointment is clearly good, as the interest of the appointees will vest at the death of *A* who was alive at the testator's decease.[1] Now, consider for a moment, what would have been the result if each of these cases had been governed by the Hindu Law, under which you will remember no interest can be created in favour of an unborn person;[2] in the first case, therefore, *A* can make a valid appointment only in favour of such

should declare the trusts of the property, it was the date of the deed subsequently executed which should be regarded in order to determine the validity of the limitation of the property bequeathed and not the date of the testator's death; consequently, the gift operated in favour of persons who were born after the death of the testator and before the execution of the deed. It is difficult to see how this decision can be reconciled with the principles discussed above.

[1] *Per* Kindersley, V.C., in *Harvey* v. *Stracey* (1852), 1 Drew., 73; 22 L. J. Ch., 23. The view taken by Lewis in his work on Perpetuities (pp. 491-492), as to the invalidity of "an appointment, made to the child of a person unborn at the time of the creation of the power, living at the date of the appointment and specifically named in it" cannot be supported, *see* Gray, p. 325. *Morgan* v. *Gronow* (1873), L. R., 16 Eq., 1.

[2] *See* p. 68, *ante*.

of his children as were born at the date of the settlement, and, in the second case, *C* can appoint only in favour of such of the children of *B* as were in existence at the death of the testator.

The principle is well illustrated by a recent decision of the Judicial Committee.[1] In that case, a Hindu inhabitant of Bombay devised his property to trustees in trust for his wife and daughter during their lives and directed that if his daughter should die without children, the trust should, after the death of the widow and daughter, become void, and the property delivered to such persons as the daughter might by will appoint. The Privy Council held that the power was good, but that the appointment made by the daughter was valid only in so far as it was in favour of persons who were in existence either actually or in contemplation of law at the death of the testator. This is in harmony with the rule laid down in *Tagore* v. *Tagore*[2] that, although trusts are not unknown to Hindu Law, no testator can, by the intervention of trustees, create beneficiary estates of a character unauthorised by law, on the principle that a man cannot be allowed to do by indirect means what is forbidden to be done directly. I confess, however, that I find some difficulty in following up the analogy which is appealed to in the judgment of the Privy Council, to justify the exercise of a power by a Hindu. Sir Richard Couch, after pointing out that, on the authority of decided cases[3] too numerous to be now questioned, the testamentary power of a Hindu was well settled and could be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*, went on to observe that two rules applicable

Motivahoo v. *Mamoobai*.

[1] *Motivahoo* v. *Mamoobai* (1897), L. R., 24 I. A., 93, 1 C. W. N., 366; I. L. R., 21 Bom., 709, s. c. in the original court, I. L. R., 19 Bom., 647. *See* also *Mamoobai* v. *Morarji* (1890), I. L. R., 15 Bom., 443, which was in the course of the same administration suit.

[2] 9 B. L. R., 377.

[3] *Soorjeemony Dassee* v. *Denobundho Mullick* (1862), 9 Moore I. A., 123; *Sonaton Bysack* v. *Jagat Sundari Dasi* (1859), 8 Moore I. A., 85; *Beer Pertab Sahee* v. *Rajender Pertab Sahee* (1867), 12 Moore I.A., 37.

Motivahoo v. *Mamoobai.*

to the matter in hand, were deducible from the *Tagore Case*,[1] namely, (*a*) A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and, therefore, must, either in fact or in contemplation of law, be in existence at the death of the testator; (*b*) The first taker under a will, may take for his life-time,—rules which, it will be observed, define the recognised limits of the analogy between wills and gifts *inter vivos*, an analogy which does not extend to the minutest particulars, but is restricted only to the nature of the interest in property which a testator can create, and the character of the persons in favour of whom a disposition can be made. His Lordship then went on to add: "They are not aware of any authority in support of the contention that in the present case, there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them to follow, from the first taker being allowed to have only a life interest, that his possession is sufficient to complete the executory bequest which follows the gift for life. The result of the decisions is that, according to settled law, if the testator here had himself designated the person who wa sto take the property in the event of his daughter dying childless, the bequest would be good. The remaining question is whether his substituting his daughter and giving her power to designate the person by her will, is contrary to any principle of Hindu law. There is an analogy to it in the law of adoption. A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself, and, although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law, are applicable to

Analogy from law of adoption.

[1] 9 B. L. R., 377; L. R., I. A., Sup. Vol., 47.

this power, and that it is their duty to hold it to be valid. But whilst saying this, they think they ought also to say that in their opinion, the English law of powers is not fit to be applied generally to Hindu wills." You will observe, in the first place, that the objection that the person upon whom the power is conferred does not thereby acquire such an interest in property as would entitle him to exercise the power, is over-ruled on the ground that the first taker being allowed to have only a life-interest, his possession is sufficient to complete the executory bequest which follows the gift for life. But you will remember that, although the Hindu law recognizes qualified estates, namely, the estate taken by a Hindu widow, mother or daughter in her character as such, it is one of the characteristics of such estate that it does not confer upon the holder the right of alienation and does not make her a new root of descent. In the second place, if the reason assigned to support the power, is the sole reason, it would seem that if no interest whatsoever in the property is conferred on the person in whom the power resides, the power would be incapable of being exercised; for instance, if an estate is granted for life to *A*, with remainder to such of the sons of *B* as *C* might by his will appoint, it is not easy to see, upon what analogy, the exercise of the power by *C* may be justified. In the third place, you will observe that appeal is made to an analogy furnished by the law of adoption. I do not wish to enter here upon an examination of the controversy as to the character in which a Hindu female adopts, whether she does so in her own right or merely as the agent of her husband [1]; but assuming for the moment that a widow adopts under authority from and as representative of her deceased husband, you will not forget that even under the schools of Hindu law which recognise the right of the husband to delegate to his widow an authority to adopt,[2] the right of delegation is extremely limited as it can

[1] *See* Dr. Bhattacharya, Commentaries on Hindu Law, 152.

[2] Mayne on Hindu Law, § 112.

Analogy from law of adoption how far applicable.

be exercised in favour of the widow and widow alone.[1] This, surely, seems to be a rather slender foundation upon which to build a general law of powers. But the difficulty does not cease here ; for, let us assume again that the law of adoption does furnish an analogy upon which we can act, and the question arises, how far does the new analogy extend ? Does it apply, as in the case of the analogy furnished by the law of gifts, to the nature of the interest created, as well as to the character of the persons in whose favour the power is exercised ? It seems not ; for, there is nothing in Hindu law which forbids the exercise by a widow of the power of adoption conferred upon her by her husband in favour of a child born many years after the death of her husband ; the Judicial Committee, on the other hand, have laid down in the case we have been discussing, that the power could be validly exercised only in favour of persons who were in existence either actually or in contemplation of law at the death of the testator. It is difficult to say, therefore, how far the analogy founded on the law of adoption extends, and where it ceases. I trust, however, you will not misunderstand the scope of these observations, which I have made, not with

[1] See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A., 128 ; I. L. R., 27 Cal., 996 ; in its earlier stages, reported in I. L. R., 24 Cal., 589, and I. L. R., 25 Cal., 662. In this case a husband had, by his will, purported to authorise his widow, whom he made his executrix, jointly with two other persons whom he appointed his executors to adopt a son to him ; it was held by the Judicial Committee that the power of adoption which the testator purported to give was one which the law does not allow, and that it was a rudimentary principle of Hindu law, that no one except the widow authorised for the purpose by the husband, can adopt a son to him after his decease. It was pointed out that the provisions of the will did not authorise an appointment by the widow alone, but an appointment by her and two others, and that, consequently, there could not be any valid adoption by the widow. It may be observed that, though the power is exercisable by the widow alone, restriction may be placed upon her choice of a boy, if the husband imposes a condition that persons named by him should concur in the choice. See *Beem Charan* v. *Heera Lall* (1867), 2 Ind. Jur. N. S., 225, *cf.* Sugden on Powers, p. 252, where it is laid down that if the consent of any person is required to the execution of a power, that like every other condition must be strictly complied with.

a view to question the correctness of the decision of the Privy Council which is absolutely binding on the Judicial Committee and on all Indian Courts so far as it lays down any proposition of law, but rather with a view to illustrate the danger of developing the law by reference to superficial analogies. If the doctrine of powers is to be engrafted on the Hindu law, let it be done by all means; but I venture to think that the recent decision of the Judicial Committee furnishes as good an example of judicial legislation as one could imagine, and hardly belongs to the class of authorities which would be willingly applied and developed, rather than confined to the exact point decided and applied only to cases where the facts are closely similar.

I ought to point out to you that the questions we have discussed, were raised in an earlier case in Bombay.[1] Mr. Justice Farran who heard the cause in the first instance, held that powers of appointment, whether general or special, were quite unknown to the Hindu law, and no place could be found for them under that system; the learned Judge, however, went on to hold that the aggregate of practical rights which the possession of a general power confers upon the individual possessed of them, places the donee of the power in the position of the owner of an absolute estate and enables him to deal with the property as his own and to confer it upon whom he wished; consequently the power could be validly exercised, but the persons in whose favour the power is exercised, take from him and not from the original estate. The Court of Appeal,[2] however, overruled this view of the matter, and held that there was no clear principle of Hindu law which forbade a bequest to such person as another should appoint, subject, however, to the same restrictions as the Hindu

Javerbai v. *Kablibai*.

[1] *Javerbai* v. *Kablibai* (1890), I. L. R., 15 Bom., 326; on appeal, (1891), I. L. R., 16 Bom., 492. *See* also *Pertab Narain* v. *SubhaoKuar* (1877), 4 I. A., 228; I. L. R., 3 Cal., 626, where a power to appoint a successor to a taluq under the Oudh Estates Act was treated as valid. Cf. *Srinath* v. *Sarbo Mongola* (1868), 2 B. L. R., A. C. J., 144.

[2] Sargent, C. J., and Bayley, J.

Javerbai v. *Kablibai.*

testamentary law imposes on the testator himself, namely, that the appointment should be made so that (i) the appointee might be ascertained when the event arose on which he was to take, and (ii) the appointee be a person who was alive at the death of the testator. In a later case in Bombay[1] the question arose whether a Hindu lady, who had power under her husband's will to appoint by deed or will to any person she thought fit, could direct in her will, that it should be lawful for her trustees to reside free of rent in a house belonging to the family ; reliance was placed upon the decision which I have just referred to, and the validity of the appointment was successfully maintained. The principle deducible from these decisions is well illustrated by a very recent case[2] in which the High Court of Calcutta had to consider the validity of a power which authorised the widow of the testator to establish an idol and to dedicate properties for its maintenance. It was held upon the authority of *Motivahoo* v. *Mamoobai*[3] that the power conferred by will to make a gift must be a power to convey property to a person in existence either actually or in contemplation of law at the death of the testator, and consequently as the idol, to which the dedication was made was not in existence at the death of the testator, it must be treated as invalid.

Calcutta case.

In the application of the test by which the validity of an appointment in exercise of a power is tried, namely, to read it as inserted in the instrument creating the power, in place of the power, you must not forget the fundamental distinction between particular powers created by deed and by will. A deed, as you know, speaks from the date of its execution, and subsequent events cannot affect the validity of limitations contained in it.[4] A will, on the other hand, speaks from the death of the testator, and

[1] (1893), *Goswami* v. *Madhow Das*, I. L. R., 17 Bom., 600.

[2] (1897), *Upendralal* v. *Hem Chundra*, I. L. R., 25 Cal., 405 ; *see* also *Rajomoyee* v. *Troyluckomohiney* (1901), 6 C. W. N., 267.

[3] (1897), 24 I. A., 93 ; I. L. R., 21 Bom., 709.

[4] A voidable deed, if subsequently confirmed, speaks from its own date for this purpose. *Cooke* v. *Cooke* (1887), 38 Ch. D., 202.

limitations which were apparently bad when the will was made, may prove to be good when it comes into operation. Hence, in the case of a power created by will, children born in the testator's life-time, though after his will, stand in the same position as children born at the execution of the deed in cases where the power is created by deed. The distinction, however, is limited only to instruments creating the power, and does not extend to instruments executing the power. To take one illustration, an appointment cannot be made in exercise of a power in a marriage settlement, in favour of the grand-child of the parties, because the parent of such grand-child could not possibly be in existence at the date of the creation of the power; on the other hand, in exercise of a power created by a will, a valid appointment can be made in favour of a grand-child of the testator, inasmuch as the parent of such grand-child must have been in existence, either actually or in contemplation of law, at the time when the will took effect. To take another example, in *Slark* v. *Dakyns*,[1] a testator gave certain property upon trust for his grand-daughter *X* for life, and after her death for her children, or such of them as she should by deed or will appoint; *X*, by her will, appointed one-fifth of the fund to each of five children for life, all of whom were living at the death of the original testator, and directed that, after the death of each child, the share in which the child had a life-interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment, in favour of the survivors in different events. Lord Romilly, M. R., held that the power was well executed, as all the children were in existence at the time of the creation of the power, and this view was affirmed on appeal.[2]

Powers created by deed and by will.

Slark v. *Dakyns.*

[1] (1873), L. R., 15 Eq., 307; on appeal (1874), L. R., 10 Ch. Ap., 35, following the decision of Shadwell, V.C., in *Phipson* v. *Turner* (1838), 9 Sim., 227. *See* also *Bell* v. *Bell*, 13 Ir. Ch., 517.

[2] *See* also *Peard* v. *Kekewich* (1852); 15 Beav., 166; 21 L. J., Ch., 456, where Sir John Romilly, M. R., held that the donee of a power cannot give the fund to any person to whom the original creator of

General powers.

I have already pointed out to you the distinction between a general and a particular power of appointment, and shown that a general power of appointment is outside the Rule against Perpetuities. As Lord St. Leonards says, a general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; in this respect, there is no distinction between a power exercisable by deed or will, or by will only; whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power and not of the creation of it.[1] When, therefore, a married woman exercises a general testamentary power, the time under the Rule against Perpetuities, runs from her death, and neither from the date of the instrument creating the power, nor from the date of the will.[2] But you must not overlook that the very principle

the power could not himself have given it, and treated the power, which had been created by will, as well exercised in favour of the testator's grandson who was born between the date of the will and the time when the power came into effect, that is, the death of the testator: Cf. *Wilkinson* v. *Duncan* (1861), 30 Beav., 111; 26 L. J., Ch., 495; *Duke of Devonshire* v. *Cavendish* (1782), 4 T. R., 741, n.

[1] Sugden on Powers, p. 394.

[2] *Rous* v. *Jackson* (1885), 29 Ch. D., 521; *Edmunds* v. *Edmunds* (1885), W. N., 1885, p. 206; 53, L. T., 717. The decision of James, V.C., in *Re Powell's Trust* (1869), 39 L. J., Ch., 188, is inconsistent with the course of authorities on the subject, and was dissented from by Chitty, J., in *Rous* v. *Jackson*, 29 Ch. D., 521 (526); it has, however, been defended by Prof. Gray on the ground that, although a life tenant with a general power exercisable by deed, has practically a present unconditioned right to turn his limited interest into an absolute interest and may, therefore, be regarded as having already acquired such present unconditioned absolute interest, the case is different with a life tenant who has a power which he can exercise only by will; he is not practically the owner, he cannot transfer to himself, indeed, he is the only person to whom he cannot possibly transfer, as he must die before the transfer of the property can possibly take place (Gray on Perpetuities, § 526). Cf. *Stuart* v. *Babington*, 27 L. R. Ir., 551.

upon which this rule is founded, namely, that a general power is, in point of alienation, equivalent to absolute ownership, shows that when we are concerned with a special power, the remoteness of an appointment under it is to be judged, not from the point of time of its exercise, but from the time of its creation. To take a somewhat strong example, if a person who has only a special power of appointment, in exercise of that power, confers a general power of appointment, the validity of the general power and of its exercise must be determined with reference to the creation of the special power; this becomes obvious when we remember that the donee of the special power can appoint only to particular persons, and the individual selected in exercise of such special power, cannot appoint until his own death, so that no one has absolute control over the property until the death of the appointee under the special power.[1] *Wollaston v. King.*

I have now explained and illustrated the leading principles which regulate questions of remoteness in powers; we have next to consider the consequences when an appointment is tainted with the vice of remoteness. Here it may be laid down as a general rule, that the effect of an invalid appointment upon prior or subsequent appointments, is similar to the effect of an invalid limitation upon others which precede or follow it. Thus, if an appointment which is not obnoxious to the Rule against Perpetuities is followed by an appointment which fails by reason of remoteness, its validity is not thereby affected; for instance, if under a testamentary power to appoint among issue, an appointment is made for life to a grand-child of the testator born after his death, and upon death of such grand-child, to its issue, the first appointment is good, though the latter is too remote.[2] Similarly, where the first limitation is too remote and therefore void, a subsequent limitation to an Effect of invalid appointment.

[1] *Wollaston* v. *King* (1868), L. R., 8 Eq., 165; *per* Giffard, V.C.; followed by Selborne, L. C., in *Morgan* v. *Gronow* (1873), L. R., 16 Eq., 1; contra, 3 Dav. Prec., Conv. (3rd ed.), 156, note.

[2] *Routledge* v. *Dorril* (1794), 2 Ves., 357.

Effect of invalid appointment.

object of the power will not take effect, although the persons intended to take under the void limitation have actually failed; that is to say, although the first limitation is void, it does not accelerate others dependent upon it, which, if given immediately, would have been valid.[1] In the same way, an appointment which includes objects not within the line of perpetuity and which is not severable, is wholly void, and the fund cannot be given to those to whom it might have been legally appointed[2]; this corresponds to the rule that where there is a gift to a class, some of whom are within the Rule against Perpetuities and others are not, but the class itself and the shares of each cannot be ascertained within the legal limit, the whole gift is void. I ought to point out to you that a departure from the strict rule has been suggested by Lewis[3] in cases where the power authorizes appointment only among those of a class who come within due limits, but the actual appointment is to the whole class some of whom may fall beyond the prescribed limits. According to that learned author, although when a power embraces objects, not necessarily within the perpetuity boundary, an appointment to a class, including persons too remote, is void as a whole, yet if the power authorizes an appointment to such persons only as are capable within the rule against Perpetuities, an appointment extending to persons too remote and therefore strangers to the power, will be good *pro tanto;* the remote appointees not being objects of the power, the remoteness affecting the gift to them, ought no more to invalidate the rest of the appointment, than would the introduction into it of the names of

[1] *Alexander* v. *Alexander* (1755), 2 Ves. Sr., 640; *Robinson* v. *Hardcastle* (1788), 2 T. R., 241; *Bailey* v. *Lloyd* (1829), 5 Russ., 330 (Sugden, 508).

[2] *Jee* v. *Audley* (1787), 1 Cox., 324; *Routledge* v. *Dorril* (1794), 2 Ves., 357; *Griffith* v. *Pownall* (1843), 13 Sim., 393; *Harvey* v. *Stracey* (1852), 1 Drew., 73; *Palsgrave* v. *Atkinson* (1844), 1 Coll., 190; *Ratcliffe* v. *Hampson*, 1 Jur. N. S. (1855), 1104; *Grogam* v. *Dopping*, 6 Ir. Ch., 265; *Wainwright* v. *Miller* (1897), 2 Ch., 255; *Hill* v. *Gage* (1898), 1 Ch., 498; *Turney* v. *Turney* (1899), 2 Ch., 739; Sugden, 505, *et seq.*, 1 Jarman, 260.

[3] Perpetuity, p. 498.

persons who are not members of the class at all, and in reference to whom no question of remoteness could arise; and the case would seem to be stronger when after the appointment, but before the interest created by the power takes effect, the class is actually reduced to those who are proper objects of the power. This view, I need hardly point out, is contrary to the principle that, if an appointment is bad, the Court cannot undertake to mould it and separate the legal from the illegal portion, but it may be presumed that if a case were to arise in our Courts, this liberal view would prevail on the grounds explained in the decision of the Judicial Committee in *Rai Bishen Chand* v. *Asmaida Koer*.[1]

Doctrine of election.

The question has sometimes been raised whether the equitable doctrine of election applies to cases where, in exercise of a power, void for remoteness, appointments are made in favour of objects who can possibly take no benefit under it. It seems that when an appointment fails by reason of its transgressing the Rule against Perpetuities, the Courts are not likely to favour attempts of that nature by calling in aid the application of the doctrine of election. You will remember that the principle of election is, in substance, that he who accepts a benefit under an instrument must adopt the whole of it, conform with all its provisions and renounce every right inconsistent with them[2]; the foundation of the doctrine is that you cannot accept and reject the same instrument, you cannot, to borrow the expressive phraseology of the Scotch law, approbate and reprobate the same instrument, you cannot, while claiming under a deed, interfere by title paramount to prevent another part of the deed from having effect according to its construction.[3] This principle applies to appointments under

[1] L. R., 11 I. A., 164; *see* also *Fehrsen* v. *Simpson* (1878), I.L. R., 4 Cal., 514. It has been suggested by Mr. Henderson that the principle of s. 79 of the Indian Succession Act is applicable not only when a testamentary power is not exercised, but also when it is improperly exercised. (Tag. Lect., p. 170).

[2] *Streatfield* v. *Streatfield* (1735), 1 White & Tudor L. C., 416.

[3] *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef., 444, *Codrington*

Doctrine of election.

powers, and it may be stated as a general rule that where there is a direct appointment to strangers to the power and a gift by the same instrument to the persons entitled in default of appointment, the latter will be put to their election.[1] But you must remember the important exception that the doctrine of election is to be applied as between a gift under one instrument and a claim dehors that instrument and adverse to it, and is not to be applied as between one clause in an instrument and another clause in the same instrument. The leading case on the subject is *Wollaston* v. *King*,[2] where a testatrix, having, under her marriage settlement, power to appoint a fund in favour of the children of the marriage, in execution of the power, appointed by will a portion of the fund to her son for life, with remainder to such persons as the son should by will appoint; there was also a general residuary appointment of the settled fund, subject to all other appointments made thereof, to her daughters, to whom benefits out of her own property were also given by the will. Vice-Chancellor Giffard held that the power to the son to appoint by will was void for remoteness, and the daughters took under the residuary appointment the settled property appointed to the son; the appointees under the testamentary power executed by the son sought to put the daughters to their election between the settled property appointed to themselves by the son and the property of the testatrix given to the daughters by her will. It was held by Vice-Chancellor James in a considered judgment that the doctrine of election did not apply, as the daughters could not be said to claim adversely to the will within the meaning of the rule. The learned Judge, after explaining the principle on which the doctrine of election rests and its applicability to gifts made in execution of a power, went on to add:

Wollaston v. *King*.

v. *Codrington* (1875), L. R., 8 Ch. Ap., 578; L. R., 7 H. L., 854.

[1] *Whistler* v. *Webster* (1794), 2 Ves., 367; *Re Wheatley* (1881), 27 Ch. D., 606; *Re Brooksbank* (1886), 34 Ch. D., 160.

[2] (1868) L. R., 8 Eq., 165.

"The rule as to election is to be applied as between a gift under a will and a claim dehors the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will. It would seem a very strange thing that, in construing the same instrument the Court, dealing with a clause in which a fund is expressed to be given partly to *A* and partly to *B*, should hold that the gift to *A* being void, the testator's intention is that *B* should take the whole; and, then coming to another clause in which another fund is given to *B*, and no mention of *A* at all, it should hold that there is an implied condition that *B* should give back part of that which it was the testator's intention that he should take. It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise."[1]

Wollaston v. *King*. James, V.C.

I shall conclude this lecture with a brief reference to a class of powers which have been held to be outside the scope of the Rule against Perpetuities, I mean powers of sale, exchange, lease and other similar powers usually inserted in settlements of real estate. The validity of such powers, though doubted by Lord Eldon[2] is now firmly established, and without entering into a minute examination of the earlier authorities on the subject[3] which are not easy to reconcile, we may take it as well settled that no limits are necessary in giving these powers to trustees. I may point out, however, that though the power of sale is unlimited in point of time, some limit is generally found in practice to avoid an infringement of the Rule against Perpetuities, and this limit in wills and settlements is the

Validity of power of sale.

[1] *See* this case criticised by Prof. Gray (Perpetuities, §§ 557—561). Cf. *Warren* v. *Rudall* (1860), 1 J. & H., 1; 29 L. J., Ch., 543, where Wood, V.C., said that the question is one of intent and intent only, and you cannot adhere to any rigid formula. *See* also *Churchill* v. *Churchill* (1867), L.R., 5 Eq., 44.

[2] *Ware* v. *Polhill* (1805), 11 Ves., 257.

[3] Sugden on Powers, pp. 847—851.

Power of sale.

period when the absolute interests vest in possession.[1] But it does not follow that a power of sale which exceeds that period, if it be limited so as to avoid an infringement of the Rule against Perpetuities, is void. Thus, as pointed out by Sir George Jessel, M. R.,[2] if the devise be to trustees in trust for *A* for life, and after his death for *B* and *C*, adults with a power of sale for the purpose of division, or, if the devise be to trustees to divide among several adult persons, with a power of sale for the purpose of division, the power is in each case valid.[3] Similarly, it has been held that a power to sell to raise money for paying debts or legacies is not obnoxious to the rule against remoteness. The reasons, however, which have been sometimes assigned why these unlimited powers do not violate the rule, are not very satisfactory;[4] the most plausible one seems to be that the trusts to which such powers are attached must either come to an end or can be destroyed within the limits fixed by the Rule against Perpetuities.

[1] *Lantsbery* v. *Collier* (1855-56), 2 K. & J., 709; 25 L. J., Ch., 672. *See* also *Taite* v. *Swinstead* (1859), 26 Beav., 525; *Wolley* v. *Jenkins* (1856), 23 Beav., 53; *Biddle* v. *Perkins* (1829), 4 Sim., 135; *Nelson* v. *Callow* (1848), 15 Sim., 353; *Waring* v. *Coventry* (1833), 1 M. & K., 249.

[2] *Peters* v. *Lewes* (1881), 18 Ch. D., 434.

[3] *See* also *Re Cotton* (1882), 19 Ch. D., 624. *See* also *Sudeley and Baines & Co.* (1894), 1 Ch., 334.

[4] 1 Hayes' Conveyancing, 498 (5th Ed.).

LECTURE IX.

THE RULE AGAINST PERPETUITIES IN RELATION TO PRINCIPLES OF CONSTRUCTION.

Golden rule of construction.

IN the present lecture I purpose to discuss the Rule against Perpetuities in relation to principles of construction. But, before I do so, I must ask you to bear in mind the strong disapprobation, which eminent Judges have expressed, of all attempts to fetter the law by maxims which are almost invariably misleading, as they are so large and general in their language that they often include something which is not really intended to be included in them. Subject to this reservation, however, that stereotyped rules cannot be accepted as infallible canons, if there is any rule of construction which is of almost universal application, it is that which Lord Wensleydale called the golden rule for construing all written engagements: "In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."[1] And this principle is so faithfully applied that it has been laid down by Chief Justice Tindal that "not only ought we to look to the words of a will alone, to determine the operation and effect of the devise, but we ought to disregard altogether the legal

Lord Wensleydale.

Tindal, C. J.

[1] *Grey* v. *Pearson* (1857), 6 H. L. C., 61 (106); 26 L. J., Ch., 473 (481); *Thellusson* v. *Rendlesham* (1859), 7 H. L. C., 429 (519); 28 L. J., Ch., 948 (966); *per* Lord Wensleydale. *See* also *per* Lord Blackburn in *Caledonian R. Co.* v. *North British R. Co.* (1881), 6 App. Cas., 114 (131).

consequences which may follow from the nature and qualities of the estate when such estate is once collected from the words of the will itself."[1] In other words, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained; but, although for this purpose, you ought to look to the instrument as a whole, not recklessly deviating from the literal sense of the words nor slavishly adhering to them, when to do either would obviously defeat the intention which may be collected from the whole document, yet as Lord Halsbury put it,[2] you would be arguing in a vicious circle if you started by assuming an intention apart from the language of the instrument itself, and, having made that fallacious assumption (for instance, an assumption that the settlor intended to create such estates only as the law allows), you began to bend and twist the language in favour of the assumption so made.

Lord Halsbury.

Rule against Perpetuities not a rule of construction.

The principles I have just explained are applicable to cases where questions arise upon the Rule against Perpetuities, which is not a rule of construction, not a test more or less artificial, to determine intention, but an absolute inflexible rule of law, one of the legacies of the Middle Ages, the object of which is to defeat intention. In such cases, therefore, the instrument is to be construed without any reference to the rule, and then the validity of the disposition is to be tested by the application of the rule. Thus, in *Dungannon* v. *Smith*,[3] Mr. Baron Parke, one of the learned Judges summoned to advise the House of Lords, in delivering his opinion said: "There is no doubt of the course to be pursued. We must first ascertain the intention of the testator, or more properly the meaning of his words, in the clause under consideration, and then endeavour to give effect to them so far as the rules of law will permit. Our first duty is to construe the will; and this we must do, exactly in the same way as

Dungannon v. *Smith*.

[1] *Scarborough* v. *Doe d. Savile* (1836), 3 A. & E., 897 (962).

[2] *Leader* v. *Duffey* (1888), 13 App. Cas., 294 (301); 58 L. J., P. C., 13 (16).

[3] (1846) 12 Cl. & F., 546 (599).

if the Rule against Perpetuity had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it." Mr. Justice Patteson, in the same case,[1] observed: "I apprehend that in order to arrive at the true meaning of the will, it must be construed without reference to any rule of law respecting remoteness, that is, in the first instance, and for the sole purpose of ascertaining the testator's meaning."[1] And, similarly, Mr. Justice Maule said: "The existence of the rule as to perpetuities is certainly no reason for altering the construction of the bequest. The words of the testator are clear and unambiguous; there is no difficulty in dealing with them as they stand in the will, unless it be sought to evade the rule against perpetuity."[2] It is hardly necessary to multiply authorities, and I must content myself with placing before you the statement of the rule by Lord Chancellor Selborne in a recent case[3]: *Pearks v. Moseley.*

"The rule which has always been applied to cases of remoteness is this: you do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of that law. So understanding the rule Selborne, L. C.

[1] 12 Cl. & F., 588.
[2] 12 Cl. & F., 578-579.
[3] *Pearks* v. *Moseley* (1880), 5 App. Cas., 714 (719); *see* also the observations of Lord Blackburn at p. 733.

the first question in every case of this kind is that of pure and simple construction—what is the meaning of the words which the testator has used? what would their effect be, if there was no law of remoteness?"[1] You will not have failed to observe that in this passage a distinction is suggested between the case of an instrument which is expressed in clear and unequivocal language, and the case of a document which is really ambiguous and fairly capable of two constructions; in the former case, you must interpret the language as you find it and then apply the Rule against Perpetuities, however harsh the consequences may seem to be; in the other case, if the disposition is really susceptible of two constructions, one of which will support, and the other defeat a testator's intention, it is a fair presumption that the testator meant to create a legal rather than an illegal interest.[2] This is both good sense and good law, for, as Lord Coke quaintly puts it, "whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."[3] This preference, in doubtful cases, for the construction which produces a legal result and carries into effect the intention of the testator, may be substantially strengthened if it appears from the whole of the will that the testator had the law against perpetuities constantly before his mind and had anxiously guarded against making the limitations contrary to that law.[4]

Ambiguity.

Lord Coke.

[1] See also the second rule in *Cattlin* v. *Brown* (1853), 11 Hare, 372, p. 168 *ante; Cunliffe* v. *Brancker* (1876), 3 Ch. D., 393 (399); *Speakman* v. *Speakman* (1849-50), 8 Hare, 180 (185); *Taylor* v. *Frobisher* (1852), 5 DeG. & Sm., 191 (197) *Harvey* v. *Stracey* (1852), 1 Drew., 73 (126).

[2] *Christie* v. *Gosling* (1866), L. R., 1 H. L., 279 (290). *See* also *Atkinson* v. *Hutchinson* (1734), 3 P. Wms., 258 (260); *Keiley* v. *Fowler*, Wilmot, 298 (307); *Thellusson* v. *Woodford* (1798), 4 Ves., 227 (312); *Leach* v. *Leach* (1843), 2 Y & C. C. C., 495 (499); *Pearks* v. *Moseley* (1880), 5 App. Cas., 714 (719).

[3] 1 Co. Lit., 42 *a*, *b*.

[4] *Martelli* v. *Holloway* (1872), L. R., 5 H. L., 532 (548). *See* also *Chapman* v. *Brown* (1765), 3 Burr., 1626, which shews that estates void

Invalid limitation cannot be ignored.

It follows as an obvious corollary from what I have already stated that if a clause in a will is obnoxious to the Rule against Perpetuities, such clause cannot be disregarded in construing the will, but must be read as the expression of the testator's intention as if no such rule existed; any dispositions which, so reading and construing the will, are found to be the testator's wishes, must be taken to be his wishes, and, if those wishes offend against the rule, the gifts would be bad, and must fail accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established.[1]

Rules of construction evaded.

The principles I have explained, though simple in theory, and not particularly difficult in application, have unfortunately been sometimes ignored, and, if you examine the cases in the books, you will come across not a few in which well-settled canons of construction have been evaded with a view to prevent the operation of the Rule against Perpetuities. It is not necessary to discuss how far Judges may be or ought to be able to defeat a rule of law of which they disapprove, for, so far as I know, it is always avowed that the duty of a Judge in construing an unambiguous instrument is not to allow himself to be influenced by any considerations as to the

for remoteness would not be raised by implication. *Cf.* sec. 71 of the Indian Succession Act. *See* also *Bankes* v. *Le Despencer* (1840), 10 Sim., 576; 11 Sim., 508; 9 L. J. Ch., 185; 7 Jur., 210. Mr. Marsden thus summarises the result of the decisions:

"The cases illustrating the effect, upon the construction of an instrument, of a reference in the instrument itself to the Rule against Perpetuities, are, for the most part, those in which the question of remoteness has arisen in connection with the settlement of heirlooms or real estate, so as to go along with either other property in settlement or with a dignity. The rule seems to be that, even where no executory trust is created, a direction that property shall accompany a dignity, or other settled property, so far as the law will permit, or so far as the rules of law and equity will permit, or so far as the different nature or tenure of the property will permit, is a disposition which operates only within the line of perpetuity. Where the limitation in question is by way of executory trust, there is no doubt that such is the rule" (276).

[1] *Heasman* v. *Pearse* (1871), L. R., 7 Ch. App., 275 (283), *per* Lord Justice James reversing the decision of Malins, V. C., in L. R., 11 Eq., 522 (535).

ultimate result. But though this may be so in theory, even Judges allow themselves, sometimes unconsciously, perhaps, to warp the language of an instrument so as to carry out the intention of the testator, specially if the disposition meets with the sympathy and approbation of the particular Judge; for, although the Rule against Perpetuities is founded on a beneficent principle, its rigorous application undoubtedly causes considerable hardship in individual cases. One of the most striking instances of this irregular action of the judicial mind which can neither be defined nor anticipated, is furnished by the oft-cited case of *Forth* v. *Chapman*[1] where, contrary to the well-settled rule that the same words in different parts of a will should be given the same meaning, Lord Chancellor Parker construed the phrase "die without leaving issue," when used in relation to a gift over of freehold, to mean failure of issue generally at any time, and when used in relation to a gift over of personalty, to mean failure of issue at a certain time; and the reason which was assigned for thus putting two different constructions upon the same words in the same will, was that both the devises ought to be made good.[2]

Forth v. *Chapman.*

[1] (1720) 1 P. Wms., 663; Tudor, L. C., 371; *see* 2 Jarman, 1324, where it is shown that the principle of *Forth* v. *Chapman* has been confirmed by a long train of subsequent decisions.

[2] For other instances in which rules of construction have been disregarded in order to give effect to a limitation which by ordinary rules would be void for remoteness, see *Mogg* v. *Mogg* (1852), 1 Mer., 654; 15 R. R., 185; *Leach* v. *Leach* (1843), 2 Y. & C., 495; *Kevern* v. *Williams* (1832), 5 Sim., 171; *Elliott* v. *Elliott* (1841) 12 Sim., 276; 10 L. J. Ch., 363, where the rule in *Andrews* v. *Partington* (1791), 3 Brown C. C., 404, was not applied. In the last of these cases, a testator gave his personal estate to his daughter's children in equal shares, as and when they should attain their respective ages of twenty-two years, the interest on their respective shares to be accumulated and to be paid to them along with the principal. Vice-Chancellor Shadwell held, that the gift in question was a gift to such only of the daughter's children as were alive at his death. It may be observed, as the gift was of a residue, it was not contingent and consequently the provision for delaying payment was void, and the gift went immediately on the testator's death, as a gift in possession, to the daughter's children then living; but if the gift is treated as contingent, it is difficult to see how the decision can be supported. Similarly, in *Kevern* v. *Williams*, where a testator gave

Modifying clauses.

The same anxiety on the part of Judges to prevent a testator's dispositive scheme from proving abortive by reason of the rule against remoteness, is manifested in the series of cases which have established the doctrine that when there is a good absolute gift, and the settlor or testator goes on, in an additional clause, to modify the gift, and by modifying it makes it in part too remote, the modification is rejected but the original gift stands. This result, of course, can be achieved only by ignoring two familiar rules of construction, namely, that though the Courts can construe and expound the words of a will, yet they cannot strike them out of it entirely,[1] and that preference ought to be given to the posterior of two inconsistent clauses.[2] The principle, however, of rejecting the subsequent qualification, void for remoteness, which is sought to be engrafted upon the original absolute gift, is firmly established, and is defended on the ground that the author of the limitations intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one[3]; and here I ought to add that the principle applies as well to appointments under powers as to bequests and devises.

his properties to trustees, after the death of his wife, in trust for the grand-children of his brother, to be by each of them received when they and each of them should severally attain twenty-five and not before, it was held that only those grand-children who are born before the death of the testator's widow, should share in the property. This decision may be supported on the principle, that upon a gift to a class, only those are included who are in existence at the time of distribution, and the time of distribution is taken to be the time when the first of the class is entitled to his share. As authorities for the proposition that when a gift to a class on reaching a certain age is accompanied by a valid gift over on failure of any member of the class to reach that age, all members of the class coming into existence before the eldest reaches the required age, are allowed to share, see *Andrews* v. *Partington* (1791), 3 Brown C. C., 401; *Barrington* v. *Tristram* (1801), 6 Ves., 345; *Whitbread* v. *St. John* (1804), 10 Ves., 152; *Balm* v. *Balm* (1830), 3 Sim., 492; *In re Emmet's Estate* (1879-80), 13 Ch. D., 484. *See* also Theobald on Wills, 257, 2 Jarman, 1018.

[1] *Per* Lord Hardwicke in *Southcot* v. *Watson* (1745), 3 Atk., 226 (233).

[2] *Per* Baron Parke in *Morral* v. *Sutton* (1845), 1 Ph., 533 (537), 14 L. J. Ch., 266 (269), referring to Co. Litt., 112 *b*.

[3] Lewis on Perpetuities, 535. *Quære:* Whether the distinction

Whittell v. Dudin.

One of the earliest cases which established the rule that where there is an absolute gift followed by an attempt to limit the effect of that gift, if the limitation cannot for some reason take effect, the original gift will take effect, is *Whittell* v. *Dudin*[1]; there a testator devised the residue of his estate to be equally divided among his wife, sons and daughters, and directed, as to the shares of the daughters, that they should be placed in the funds in the names of trustees, that the interests be paid to the daughters for their lives for their separate use, and that after their deaths, the shares, to the interest of which the daughters should have been entitled for life, be given to their children equally, with benefit of survivorship; two of the daughters survived the testator, and subsequently died without children. Sir Thomas Plumer, M. R., held that the latter part of the residuary bequest could not be looked upon as the sole and original bequest to the daughters and their children, but was a qualification annexed to a prior gift; consequently in the event which happened, upon failure of the specific objects for whose benefit the limitations were engrafted on the absolute gift, as the qualification could not take effect, the original gift prevailed, and the representatives of the daughters were entitled to their shares. The principle thus laid down was followed in *Lassence* v. *Tierney*[2] where Lord Cottenham laid down that if a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; and this view was subsequently adopted by the House of Lords.[3]

Lassence v. Tierney.

Arnold v. Congreve.

In the cases I have just mentioned, the disposition in the modifying or qualifying clause failed for reasons other than the vice of remoteness. But in *Arnold* v.

faintly suggested by Lewis (p. 540) between wills and deeds in this respect, is well founded.

[1] (1820) 2 Jac. & Walk., 279; 22 R. R., 124. Cf. *Watkins* v. *Weston* (1862), 32 L. J. Ch., 396, affirmed on appeal, at p. 609.

[2] (1849) 1 Mac. & G., 551; 2 Hall & Twells, 115 (131).

[3] *Kellett* v. *Kellett* (1868), L. R., 2 H. L., 160, *per* Lord Chancellor Cairns.

Congreve,[1] where a testator, who had absolutely devised certain legacies to her grandchildren, directed by a codicil that the share of each grandchild should be settled on it for life and afterwards on its children, the limitations in favour of the great-grandchildren were void for remoteness, and Sir John Leach, M. R., held that the absolute interests conferred on the grandchildren were not affected by the ineffectual attempt in the codicil to modify them. Similarly, in *Ring* v. *Hardwicke*,[2] a testator who had absolutely bequeathed all his personal estate equally to his two sons and two daughters, went on to direct, concerning the shares of the daughters, that the share of each daughter be invested in the names of trustees in trust to pay the income to her during her life, and upon her death to her children, to become vested in them when they attained the age of twenty-five, with gifts over in case any of such children died under twenty-five ; Lord Langdale, M. R., held that the gift over was void for remoteness, but that the absolute interest given in the first instance to the daughters, was in no way affected by the futile attempt at restriction contained in the modifying clause.

Ring v. *Hardwicke.*

The leading authority upon the precisely analogous class of questions in relation to the execution of powers, is *Carver* v. *Bowles*.[3] In that case a testator, in exercise of a power under his marriage settlement, appointed a fund to his two sons and three daughters, to be equally divided among them, and then proceeded to declare that the shares of the daughters should be held for themselves for life without power of anticipation, and upon their death to go to their issue. Sir John Leach, M. R., held that the bequest to the issue was void for remoteness, but that did not affect the absolute interest appointed to the daughters. The same principle is deducible from

Carver v. *Bowles.*

[1] (1830) 1 Russ. & Myl., 209 ; 8 L. J. Ch., 88, O. S.

[2] (1840) 2 Beav., 352. *See* also *Harvey* v. *Stracey* (1852), 1 Drew., 73 (139) ; *Stephen* v. *Gadsden*, (1855), 20 Beav., 463 ; *Gerrard* v. *Butler* (1855), 20 Beav., 541 ; *Courtier* v. *Oram* (1855), 21 Beav., 91 ; *Churchill* v. *Churchill* (1867), L. R., 5 Eq., 44 ; *Lyddon* v. *Ellison* (1854), 19 Beav., 565 ; *Reid* v. *Reid* (1858), 25 Beav., 469.

[3] (1831) 2 Russ. & Myl., 301 ; 9 L. J. Ch., 91, O. S.

Kampf v. *Jones.*

Kampf v. *Jones*,[1] where, however, it is doubtful whether the whole modification was rejected because the bequest was in favour of persons who were not objects of the power, or because it was tainted with the vice of remoteness.[2]

You must remember, however, that to bring a case within the principle I have explained, it is essential that the original gift should be an absolute gift; in other words, the failure of the modification attempted in the qualifying clause, if it does not affect, cannot also enlarge the scope of the prior bequest. As an illustration, I may refer to *Whitehead* v. *Rennett*,[3] where a testator directed his property to be sold and the proceeds "invested for the benefit of his three daughters," the interest of the fund to be paid to each of the daughters for her life, and upon the death of each of them, half of her share to be paid to her children at the age of twenty-one, the other half to such grandchildren for life only and afterwards to their children at twenty-one. Kindersley, V. C., held that the gift to the children of the grand-children was void for remoteness, but that the direction to invest for the benefit of the daughters subject to the limitations stated, did not amount to an absolute primary gift.

Whitehead v. *Rennett.*

Marriage Settlements.

The principle I have just explained has been applied in England in cases of settlements on married women with a clause against anticipation. You will remember that under the English law, an estate in fee-simple or a life interest may be given to the unborn daughter of a living person inasmuch as the whole interest must vest within the period prescribed by the Rule against Perpe-

[1] (1837) 2 Keen, 756; 7 L. J. Ch., 63.

[2] In *Churchill* v. *Churchill* (1867), L. R., 5 Eq., 44, Lord Romilly, M. R., said that if an appointment is complete and absolute, and if in a subsequent part of the will the testator seeks to impose a condition and restriction on the appointment first made, "as the subsequent condition and restriction are simply void, the original gift remains unaltered and unaffected by that which has in truth no efficacy whatever." See also *Harvey* v. *Stracey* (1852), 1 Drew., 73; 22 L. J. Ch., 23. See *McDonald* v. *McDonald* (1875), L. R., 2 Sc. & Div., 482, where the principle was substantially affirmed by the House of Lords. Cf. *Cooke* v. *Cooke* (1887), 38 Ch. D., 202.

[3] (1853) 22 L. J., Ch., 1020.

tuities. If, however, there is a clause against anticipation attached to the estate it cannot be dealt with as a whole ; there will be a condition precedent to dealing with the income of each year, that the year should arrive ; and as this may not happen within the time limited by the rule, an estate to an unborn daughter with a clause against anticipation will be too remote. Such an estate may be treated in one of three ways : *first*, the restraint against anticipation may be regarded as good for twenty-one years after the life in being ; *secondly*, it may be treated as wholly bad ; *thirdly*, the clause against anticipation may be disregarded and the estate treated as valid ; this last view is the one which has been adopted in practice. The leading case upon the subject is *Fry* v. *Capper*,[1] where under a power of appointment of a trust fund among children, the share of a married daughter who was unborn at the creation of the power, was limited to trustees, upon trust for her separate use for life without power of anticipation, and after her death, to such person as she might, by deed or will, appoint and in default, to her executors or administrators. Vice-Chancellor Wood held that the appointment was not void for remoteness, but that the restraint upon anticipation might be rejected and the rest of the appointment sustained.[2] The same view

Clause against anticipation.

Fry v. *Capper*.

[1] (1853), Kay, 163.

[2] "In the case of an appointment under a power, the Court looks to the scope and intent of the power, and in appointments by will of real estate, has, by the doctrine of *cy pres*, given effect to them against the very words of the instrument and has enabled grandchildren, who were not objects of the power, to take under a limitation to a child for life, with remainder to the children of such child, by treating the first taker as a tenant in tail; and because the words of the appointment would otherwise have been wholly inoperative, the Court has thus given effect to it in the mode in which it can take effect legally. Therefore in an instrument made in execution of a power of appointing among children only, if the Court finds an appointment of a share to one child, with a direction that such share shall be dealt with in this way, the Court may reject that part of the limitation which exceeds the legal limits. Although the donee of the power cannot appoint to grand-children, nor to persons unborn, in the manner in which he has attempted to limit the property, yet the Court will so modify the limitation as to make it effective in the manner in which it may take effect according to the power." *Per* Wood, V. C., in *Fry* v. *Capper*, Kay, 170.

was taken by James, V. C., in a later case,[1] in which he held that a clause against anticipation attached to an estate given to an unborn child should be disregarded; and this was followed by Sir George Jessel, M. R., though not without some reluctance.[2]

ust for class unborn ersons.

In addition to the two classes of cases we have just considered, namely, cases in which an absolute gift is modified into a life estate and a remote remainder, and cases in which a valid estate is coupled with a clause against anticipation which is bad for remoteness, the doctrine may be applied where a gift is made in trust for a class of unborn persons and a discretion given to trustees to distribute the income in such proportion as they see fit or to add it to the capital; it must be remembered, however, that to make the principle applicable, the clause giving the trustees discretion must be separate from the gift.[3]

[1] *Re Teague's Settlement* (1870), L. R., 10 Eq., 564. *See* also the decision of Malins, V. C., in *Re Cunynghame's Settlement* (1871), L. R., 11 Eq., 324.

[2] *Buckton* v. *Hay* (1879), 11 Ch. D., 645. *See* also *Carver* v. *Bowles* (1831), 2 Russ. & M., 301; *Thornton* v. *Bright* (1836), 2 Myl. & Cr., 230; *Dickinson* v. *Mort* (1850), 8 Hare, 178; *Hodgson* v. *Halford* (1879), 11 Ch. D., 959, where the question of remoteness ought to have been raised, but was apparently overlooked. Cf. *Armitage* v. *Coates* (1865), 35 Beav., 1, where the question of remoteness was raised, but not determined.

[3] See *Webb* v. *Sadler* (1873), L. R., 14 Eq., 533; L. R., 8 Ch. App., 419; where under a power in a marriage settlement to appoint to children, property was appointed to a son for life, subject to such trusts as he should, by deed, with the consent of certain persons or by will appoint; it was held that the appointment to the son's appointees was bad for remoteness inasmuch as the persons whose consent was essential might perhaps not be born till after the date of the marriage settlement. Lord Chancellor Selborne observed that the consent was an inseparable condition of the exercise of the power, that in reality there was no power except with consent and that consequently there was no analogy between the effect of the clause in question and the cases where there was a separate and superadded condition after the gift of an estate. *See* also *Wilson* v. *Wilson* (1858), 28 L. J., Ch. 95; *Herbert* v. *Webster* (1880), 15 Ch. D. 610, which show that when gifts are made to several persons by one description, but the gift to one is not affected by the existence or non-existence of the others, the gifts are separable, and if modifying clauses are not too remote when applied to the gifts to some of the persons, but are too remote when applied to the gifts to the others, they will be operative in the former cases and ignored in the latter.

I shall conclude this lecture with a brief examination of what is known as the doctrine of *cy pres* which furnishes another striking illustration of the way in which Courts have sought to prevent the operation of the Rule against Perpetuities and thus to give effect substantially to the intentions of the testator. I must confine myself to a statement only of the leading principles of this topic, as the doctrine has not yet been applied to cases in India, and it may be expected that should it be so applied, the technicalities by which this useful principle of English law is hedged in, will not be imported in their entirety. The phrase *cy pres*, as you know, literally signifies *near to it*, and for this reason the principle has been described by some as the principle of approximation. It sometimes happens that a testator has two objects in view, one primary or general, the other secondary or particular; now, if these objects be incompatible, and it be impossible to carry out both, it seems reasonable to sacrifice the particular object so as to give effect to the general or paramount intent *as near as may be* to the testator's intention, in accordance with law. Thus, Lord St. Leonards, in a well-known passage, says[1]: "It is a rule of law that where a testator has two objects, one particular and the other general, and the particular intent cannot be effected unless at the expense of the general one, the latter shall be carried into effect at the expense of the former. This is the case where a man gives an estate for life, with remainder to his issue; but the estate is so given that all the issue cannot take, unless through the parent. The particular intent is that the parent shall take only for life; the general intent is that all the issue shall take; and in these cases, the Court will effectuate the general, at the expense of the particular, intent, by giving the parent an estate tail." The doctrine is nowhere more clearly stated than by Butler in one of his celebrated notes to Fearne on Contingent

Cy pres doctrine.

Lord St. Leonards.

Butler.

[1] Powers, p. 498.

Butler.

Remainders[1]: "The cases in which this doctrine has been received, have arisen on devises, in which the testator has expressed himself in terms which have been thought by the Courts to contain a clear indication of his intention that the devisee and his issue should take the lands and an intimation of the mode in which he intended the issue should take them; and his language in respect to the mode of the issues taking them, has been thought by the Courts to be such, as construed literally, imported limitations contrary to law. In construing these devises, the Courts have considered that the testator's primary object was, that the issue of the devisee should take the land, and that the mode in which the issue should take it, was the testator's secondary object; or, as it has been usually expressed, that the former was his general, the latter his particular intention. Then, in conformity to their uniform practice of effecting the testator's intention as far as possible, they have thought themselves required to adopt that construction of the devise, which by including the issue of the devisee, satisfied the testator's general intention that the issue should take; but, which, at the same time, by raising for the issue, estates different from those which the testator appeared to have intended them, sacrificed, to that extent, his particular intention. Thus where the testator has devised lands to a person and his issue and has appeared to intend that all the devisee's issue should take the lands, and, at the same time, has appeared to intend to devise estates by purchase to the children of unborn children of the devisee, the Courts have considered such limitations contrary to law; but as the will has appeared to them to shew an intention that the issue should take, and this intention could be effected by the issue's taking derivatively through the ancestor, the Courts, rather than the testators' intention should absolutely fail of effect, have put such a construction on the devises, as vested the inheritance in the ancestor himself. Such a construction brings all the parties in-

[1] Chap. I, sec. 6; ed., Smith, Vol. I, p. 204.

tended to be benefited by the testator within the operation of the devise, and thus satisfies the testator's general intention; but, in respect to the mode in which the testator would be thought, by the literal meaning of his language, to intend they should take, this is materially varied, and thus his particular intention is sacrificed." The whole of this passage was quoted in *Monypenny* v. *Dering*[1] by Baron Rolfe who observed:

Monypenny v. Dering.

"The doctrine of *cy pres*, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity. In such cases, the law, in order to prevent the testator's intention from being entirely defeated, has treated his expressed intention as divisible into two parts: first, the intention that the first taker and his issue male or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers; and the two intentions being thus ascertained, the Courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention, shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker. By these means, the estate, if left, as it were, to itself, will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be diverted from that course by the act

Baron Rolfe.

[1] See *Monypenny* v. *Dering* (1847), 16 M. & W., 418; 17 L. J. Ex., 81.

of the first taker. Whether, in such a simple case as that which we have stated for the purpose of explaining the doctrine, it might not have been better originally to act on a different principle,—to have said that the two intentions were blended together, and so that the language of the will afforded no guide to shew what the testator intended in a case where his will in its integrity could not be carried into effect, is a matter in which it would be vain to speculate. The doctrine has been long recognised, and we should be unsettling landmarks if we were to call it in question."

Humberston v. Humberston.

One of the earliest cases in which the doctrine was applied, is *Humberston* v. *Humberston*[1] where the testator devised his estate to trustees in trust to convey to *A* for life, after his death to his first son for life, and so to the first son of that first son for life, with remainders in default of the issue male of the first son of *A*, to the second and other sons of *A* and their sons, for life, in like manner. Lord Chancellor Cowper, while laying down that an attempt to make a perpetuity for successive lives is futile, held that the sons of *A* living at the testator's death should take successively for life, but where the limitation is to the first son unborn, the limitation to such unborn son shall be in tail male. The case I have just mentioned was one of executory trust, but the rule is equally applicable to cases of direct devise. Lord Romilly, M. R., in a recent case observed :[2] "I think the doctrine of *cy pres* established by *Humberston* v. *Humberston*[3] is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the Court, or on persons surviving him, the duty of carrying his general intention into effect by framing a settlement for that purpose, but that this doctrine is a rule of construction, and that when the Court finds that the object expressed by the testator is to give to *A* an estate

[1] (1717) 1 P. Wms., 331. *See* also *Nichol* v. *Nichol* (1777), 2 W. Bl., 1159; *Pitt* v. *Jackson* (1786), 2 Bro. C. C., 51; on appeal, *Smith* v. *Camelford* (1793), 2 Ves., 698; 3 R. R., 36.

[2] *Parfitt* v. *Hember* (1867), L. R., 4 Eq., 443.

for life, to *A's* eldest son another estate for life, and to his eldest son a third estate for life, and so on, the Court will carry that intention into effect as nearly as it can, by giving to *A* an estate for life, and to his eldest son, if unborn at the death of the testator, an estate in tail male, or, if he be alive at the death of the testator, an estate for life, with a remainder to his eldest son in tail male."[1] I ought to add that the doctrine applies to testamentary appointments in exercise of a power,[2] and, consequently, if the donee of a power appoint by will to *A*, an object of the power, for life, with remainder in tail to his first and other sons who are not objects of the power, this is construed as an estate tail in *A*.[3]

Parfitt v. *Hember.*

We have next to consider with what limitations the doctrine has been applied, for it is by no means of universal application. In the first place, it seems well settled that the principle is applied only in wills, not in deeds[4]; the distinction, so far as English law is concerned, is supported by the high authority of Lord Kenyon, Lord Eldon, and Lord St. Leonards, but it is not founded upon any intelligible principle, and ought not to be imported into this country, where new distinctions between the construction of deeds and wills are

Application of *cy pres* doctrine how limited.

[1] See *Hampton* v. *Holman* (1877), 5 Ch. D., 183 (190); *Vanderplank* v. *King* (1843), 3 Hare, 1; 12 L. J. Ch., 497. The statement in *Mortimer* v. *West* (1828), 2 Sim., 274, that the doctrine of *cy pres* is limited to cases of executory trust cannot be regarded as good law.

[2] See *Robinson* v. *Hardcastle* (1788), 2 T. R., 241; 1 R. R., 467; *Pitt* v. *Jackson* (1786), 2 Bro. C. C., 51, which has been said to carry the doctrine to its extreme limits, but has been considered binding authority; *Brudenell* v. *Elwes* (1801), 1 East., 442; 7 Ves., 381; 6 R. R., 310; *per* Lord Kenyon and Lord Eldon; *Stackpoole* v. *Stackpoole* (1843), 4 Dr. & War., 320.

[3] See *Lyddon* v. *Ellison* (1854), 19 Beav., 565, where the Court held that the direction to settle shares on the daughters of the testator was an executory trust, not void for remoteness, which ought to be executed as far as the law allowed. *See* also *East* v. *Twyford* (1851), 9 Hare, 729, where it was held that intention to give life estates to persons not born in the lifetime of the testator is to be aided, as far as the law will allow, by the *cy pres* doctrine.

[4] *Brudenell* v. *Elwes*, supra; *Adams* v. *Adams* (1777), Cowper, 651.

Limitations.

certainly to be deprecated. Secondly, the doctrine has been held inapplicable to limitations in respect of personal estates[1] or of mixed funds.[2] Thirdly, a devise will not be construed *cy pres* when such construction might have the effect of passing the estate to persons to whom no interest is given under the will or of excluding persons who, but for the rule, would take an interest under the will. Thus, if the devise be to an unborn person for life, remainder to his first son in tail male, you cannot construe it *cy pres* into an estate tail male for the unborn person, as this would let in the second and other sons.[3] Similarly, if the devise be to an unborn person for life, remainder to his sons successively in tail general, you cannot construe it *cy pres* into an estate tail male for the unborn person, for that would exclude the daughters of the sons. Fourthly, the doctrine does not apply where the intention is only to create a limited number of life estates[4]; but it is sometimes said that the case is otherwise, if the intention is to create life estates for ever.[5] Fifthly, when estates for life are devised to a class, and the share of each member is given to his or her children in tail and some of the members are born and some are not, the doctrine of *cy pres* will be applied to the shares of the latter, although not to those of the former.[6]

[1] *Routledge* v. *Dorril* (1794), 2 Ves., 357 (365), 2 R. R., 250, where the distinction between the case of real and personal estate is founded on the distinct law of descent applicable to each.

[2] *Boughton* v. *James* (1844), 1 Coll., 26 (44).

[3] *Monypenny* v. *Dering* (1847), 16 M. & W., 418; 2 DeG. M. G., 145; 22 L. J. Ch., 313. If the remainder to the children of the unborn person is in fee, the unborn person cannot take a fee *cy pres*, for this would let in the collateral relations; see *Hale* v. *Pew* (1858), 25 Beav., 335.

[4] *Seaward* v. *Willock* (1804), 5 East., 198.

The *cy pres* doctrine does not apply where the intention is to create successive terms of years determinable upon death; see *Beard* v. *Westcott* (1813—22), 5 B. & Ald., 801; 24 R. R., 553; *Somerville* v. *Lethbridge* (1795), 6 T. R., 213, 3 R. R., 157.

[5] *Per* Sir John Rolt, L. J., in *Forsbrook* v. *Forsbrook* (1867), L. R., 3 Ch. Ap., 93 (99), with reference to which case see *Hampton* v. *Holman* (1877), 5 Ch. D., 183 (193-4).

[6] *Vanderplank* v. *King* (1843), 3 Hare, 1.

Lastly, the operation of the rule is not to be extended,[1] and consequently, the doctrine may be applied to some members of a class and not to others, as well as to a portion of the property included in a devise and not to the rest. Thus, in *Vanderplank* v. *King*[2] there was a devise to *A*, the daughter of the testator for life, after her decease to all and every the child or children of *A* for their respective lives, and after the decease of such child or children of *A*, to all or every the child or children of all and every such child or children of *A*, and the heirs of their bodies as tenants in common. Wigram, V. C., held that although the devise was to the children of *A* as a class, the children of *A* born in the lifetime of the testator were entitled to estates for life, and that the estates devised to the children of an after-born child need alone be modified in accordance with the doctrine of *cy près*. This clearly indicates the principle that the doctrine, founded upon the theory of approximation, is not to be unnecessarily applied to distinct shares of the estate so as to destroy the whole intention, merely because, with respect to another share, the particular intention is sacrificed to preserve the paramount intention.[3]

Vanderplank v. *King.*

[1] *Hale* v. *Pew* (1858), 25 Beav., 335 (338); *Brudenell* v. *Elwes*, supra; *Boughton* v. *James*, supra.

[2] 3 Hare, 1; 12 L. J. Ch., 497.

[3] See also *Line* v. *Hall* (1873), 43 L. J. Ch., 107. It has been sometimes erroneously supposed that when a series of life estates is given to *A* and to successive generations of his issue, it is *A* who takes the estate tail by *cy près* and not the first generation of unborn issue.

LECTURE X.

Religious and Charitable Trusts.

Charities.

In the present lecture I purpose to deal with the subject of religious and charitable trusts. It would be impossible within the limits of these lectures, indeed it would be beyond their scope, to treat of the general law as applicable to charitable foundations, their creation and supervision; I can only discuss the subject from the special point of view of the Rule against Perpetuities.

English law how far applicable.

Before I proceed to an examination of what charities are, and how far they are affected by the Rule against Perpetuities, it is desirable to point out to you that the distinction between charitable and superstitious uses which is recognized in English law, finds no place in the law of this country. Those of you who have a familiar acquaintance with the elements of English jurisprudence as set out in the Commentaries of Sir William Blackstone, need hardly be reminded that the earliest form of charity consisted of gifts of land to religious houses. One of the inevitable effects of such a gift in feudal times was that the Crown and any intermediate lord of whom the land was held, lost their right to the military and other services, which were previously due from the tenant of the land; hence, in the case of such a gift, the land was said to be in a dead hand, or, in Latin, in *mortua manu*; the

Mortmain.

English word Mortmain was coined to describe this condition, and the conveyance of land in Mortmain was called mortising the land. It was soon found to be contrary to public policy that much land should be mortised, and consequently, after several partial restrictions, the Statute of Mortmain[1] was passed in 1279, forbidding land to be

[1] Ed. I. C. 2.

conveyed in Mortmain under the penalty of forfeiture thereof to the lord of the fee or to the Crown. You will see, therefore, that the earliest Statutes of Mortmain were called forth by the needs of the feudal ages, and it is one of the reproaches justly levelled against the jurisprudence of an enlightened nation that even so late as 1888, they were formally repealed but in effect re-enacted [1] although the reason for the law had long disappeared; the feudal rights of relief, wardship and marriage, which were lost when lands passed into the hands of a deathless owner, have long ceased to exist, and the British Infantry and Cavalry have no longer to be maintained by means of military tenures. It is extremely fortunate, therefore, that the rules of English law which prohibit bequests of money to superstitious uses, were never introduced into this country, where they would have been wholly inconsistent with the mode of life and habits of thought prevalent in native society. Thus, in the case of *Attorney-General* v. *Stewart*,[2] Sir William Grant held that the object of the Georgian Statute of Mortmain [3] was wholly political, that it grew out of local circumstances, was intended to have a local operation, and was not a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. These observations were accepted as good law and applicable to India by Lord Brougham, who pointed out, in the celebrated case of *Mayor of Lyons* v. *East India Company*[4] that 'the Statute of Mortmain was not applicable to India, because it had its origin in a policy peculiarly adapted to the circumstances of the mother country.' Then again, in the case of *Asima Krishna* v. *Kumar Krishna*,[5] Mr. Justice Markby held that, it being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *Caput Mortuum*, and incapable of alienating, you cannot break in upon that principle by engrafting upon

Statutes of Mortmain not applicable to India.

[1] Mortmain Act (1888), 51 & 52 Vict., C. 42.

[2] (1817) 2 Mer., 143. 16 R. R., 162. See also *Mayor of Canterbury* v. *Wyburn* (1895), A. C., 89.

[3] (1736) 9 Geo. II, C. 336.

[4] (1836) 1 Moore, I. A., 272.

[5] (1868) 2 B. L. R., O. C. J., 47.

it the English law of perpetuities. Similarly in a later case,[1] although the Courts set aside a will as creating secular estates of a perpetual nature, they supported devises of an equally perpetual nature in favour of idols. If it were necessary to refer you to a case arising upon the will of a testator other than a Hindu, I would invite your attention to the case of *Das Merces* v. *Cones*[2] where Norman, C. J., held that a bequest by a Roman Catholic of Portuguese descent, born and domiciled in Calcutta, for the performance of masses, is not a gift to superstitious uses.[3]

Definition of charity.

Having pointed out to you that in this country, gifts for religious and charitable uses stand on the same footing, we must now obtain a clear conception of what is meant by a "charity" before we can profitably examine the thesis that gifts to charities are not subject to the Rule against Perpetuities. In one of the earliest cases on the point,[4] Sir William Grant, Master of the Rolls, said: "Charity, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses, is it employed in this Court. Here its signification is chiefly derived from the Statute of Elizabeth. Those purposes are charitable which the Statute enumerates or which by analogies are deemed within its spirit and intendment; and to some such purpose, every bequest to charity generally shall be applied." If now you look to the preamble to the Statute of Elizabeth,[5] you will find the following enumeration of charitable objects: the relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; the repair of bridges, ports, havens, cause-

Sir W. Grant, M. R.

Statute of Elizabeth.

[1] *Krishnaramani* v. *Ananda* (1869), 4 B. L. R., O. C. J., 231.

[2] (1864) 2 Hyde, 65.

[3] See *Andrews* v. *Joakim* (1869), 2 B. L. R., O. C. J., 148; *Judah* v. *Judah* (1870), 5 B. L. R., 433.

[4] *Morice* v. *Bishop of Durham* (1804), 9 Ves., 405; 10 Ves., 521; 7 R. R., 232. See also *Hunter* v. *Attorney-General* (1899), A. C., 309.

[5] Statute of Charitable Uses (1601), 43 Eliz., C. 4.

ways, churches, seabanks, and highways; the education and preferment of orphans; relief, stock or maintenance for houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes. This enumeration of course is not exhaustive, and attempts have been made from time to time to bring particular gifts within the spirit and intendment of the Statute; these may all be classified under one or other of the following heads: (1) relief of poverty and distress, (2) advancement of learning, (3) advancement of religion, and (4) general public purposes. As illustrations of gifts for the promotion of all forms of learning, I may mention the following; for the British Museum;[1] for prizes for essays on statistics, politics or government, criticism and moral philosophy;[2] for the Royal Society;[3] to endow an existing professorship of mineralogy and geology and to found a new professorship of archæology at London;[4] to found travelling fellowships at an Oxford College;[5] to found a lecturership in polemical and casuistical divinity;[6] to educate boys in the study of mathematics;[7] to add books to a College Library;[8] to found a professorship of economic fish culture.[9] As an instance of a gift for general public purposes, I may mention the case of *Mitford* v. *Reynolds*,[10] where a gift by a testator to

Promotion of learning.

General public purposes.

[1] *Trustees of British Museum* v. *White* (1826), 2 Sim. and St., 594; 25 R. R., 270.

[2] *Thompson* v. *Thompson* (1844), 1 Coll., 381.

[3] *Beaumont* v. *Oliviera* (1868), L. R., 6 Eq., 534; L. R., 4 Ch. App., 309; *Royal Society of London* v. *Thompson* (1881), 17 Ch. D., 407.

[4] *Yates* v. *University College* (1873), L. R., 8 Ch. App., 454; (1875) L. R., 7 H. L., 438.

[5] *Attorney-General* v. *Green* (1789), 2 Bro. C. C., 492.

[6] *Attorney-General* v. *Margaret* (1682), 1 Vern., 54.

[7] *Attorney-General* v. *Hartley* (1793), 4 Bro. C. C., 412.

[8] *Attorney-General* v. *Merchant* (1866), L. R., 3 Eq., 424.

[9] *Buckland* v. *Bennett* (1887), L. J., Notes, 7.

[10] (1842) Ph., 185; (1848) 16 Sim., 105. For other illustrations of valid charitable trusts, see *Cooper* v. *Stevens* (1889), 41 Ch. D., 552; *Attorney-General* v. *Whorwood* (1750), 1 Ves. Sr., 536; *Tatham*

the Government of Bengal, of his property to be applied to charitable, beneficial and public works, in the city of Dacca, for the exclusive benefit of the native inhabitants in such manner as they and the Government might regard as most conducive to that end, was held to be a good charitable bequest. In the same way, the illustrations appended to sec. 105 of the Indian Succession Act (which is inapplicable to Hindus) show that charitable gifts include gift for the relief of poor people, for the maintenance of sick soldiers, for the erection or support of a hospital,[1] for the education and preferment of orphans, for the support of scholars, for the erection or support of a school, for the building and repairs of a bridge, for the making of roads, for the erection or support of a church, for the repairs of a church, for the benefit of ministers of religion and for the formation or support of a public garden. It would, however, serve no useful purpose if I were to lay before you a dry catalogue of the authorities in which the charitable character of these particular endowments was discussed ; it would be a more valuable lesson to you to extract the principle deducible from these cases, which is set out nowhere more distinctly than it is by Lord Macnaghten in a recent case before the House of Lords, where he said[2] "Charity in its legal sense comprises four principal divisions : (*a*) trusts for the relief of poverty ; (*b*) trusts for the advancement of education ; (*c*) trusts for the advancement of religion ; (*d*) and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to, are not the less charitable in the eye of

Lord Macnaghten.

v. *Drummond* (1864), 34 L. J. Ch., 1 ; *Marsh* v. *Means* (1857), 3 Jur. N. S., 790 ; *Obert* v. *Barrow* (1887), 35 Ch. D., 472 ; *Cross* v. *London* (1895), 2 Ch., 501 ; *Johnston* v. *Swan* (1818), 3 Mad., 457, 18 R. R., 270 ; *Barclay* v. *Maskelyne* (1858), 4 Jur. N. S., 1294 ; *Doe* v. *Howell* (1831), 2 Barn. & Ald., 744 ; *In re Hall's Charity* (1851), 14 Beav., 115 ; *Attorney-General* v. *Blizard* (1855), 21 Beav., 223 ; *Attorney-General* v. *Webster* (1875), L. R., 20 Eq., 483.

[1] See *Fanindra Kumar* v. *Admr.-Genl.* (1901), 6 C. W. N., 321.

[2] (1891) *Commissioners of Income-tax* v. *Pemsel* (1891), A. C. 531 (583).

the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly." You will see, therefore, that the term charity is used in a well-defined technical sense, and not in its popular sense as involving the idea of poverty. This is well illustrated by a recent case which came before the High Court of Bombay.[1] There the University of Bombay claimed exemption from the payment of municipal taxes on the buildings occupied by them, on the ground that the University Hall, Library and Tower were "exclusively occupied for charitable purposes;" it was contended on behalf of the Municipality that the University was not a charitable institution, because it derived a revenue from the occupation of the buildings, and also because it was not an educational university, but a merely examining body which conferred degrees on those who wished for a certificate that they had attained to a certain standard of education. Chief Justice Sargent held that although the University might not be actually engaged in education, the special object for which it grants degrees is the advancement of education, and the mere circumstance that small fees are required from the students before examining them, which produce a revenue insufficient to defray the expenses of the University in conducting those examinations and keeping up the necessary establishment and which require to be considerably supplemented by Government, cannot alter the essential character of the purpose for which the buildings are occupied.

Bombay University.

You must remember, however, that the charity, in order that it may come within the fourth class, must be a public one. Thus, it has been recently laid down by the Court of Appeal in England,[2] that though gifts for religious purposes should be treated *primâ facie* as gifts for charitable purposes, yet if it can be shown that they

Public charity.

[1] (1891) *University of Bombay* v. *Municipal Commissioners of Bombay*, I. L. R., 16 Bom., 217.

[2] *White* v. *White* (1893), 2 Ch., 41.

possess no public element and include no purpose of public utility, as was established in the case of a bequest for the benefit of a Dominican convent,[1] they will not be regarded as charitable. Thus, for instance, a gift of money to be laid out upon a building that was to stand in perpetual memory of Shakespeare, was held not to be a charitable gift.[2] A gift for the performance of ceremonies for the spiritual benefit of the donor and his family is not charitable[3] as the observance can lead to no public advantage, and a gift for the repair of a private tomb or monument[4] or to found a private museum,[5] stands on the same footing.

From what I have already stated it follows as a necessary corollary that the character of religious trusts cannot be imputed to dedications which are merely colourable. Thus, for instance, under cover of a gift for a religious purpose, it is not competent to a donor, Hindu or Mahomedan, to confer a beneficial estate of an inalienable character. If, therefore, a will, under the form of a devise for religious purposes, really gives the beneficial interest to the devisees, subject merely to a trust for the performance of the religious purposes, it will be governed by the ordinary Hindu law. This, in fact, is the fundamental distinction between what are usually called valid and invalid *debutters*, but what may be better described as absolute and qualified *debutters*; in the one case, property is given absolutely for the religious object, in the other case, it is merely burdened with a trust for its support; in the first case, the donor has no

Valid and invalid *debutters* distinguished.

[1] *Cocks* v. *Manners* (1871), L. R., 12 Eq., 574.

[2] *Thomson* v. *Shakespear* (1859), 29 L. J. Ch., 140, 276; see also *Parker* v. *Lethbridge* (1898), 79 L. J., 154; *Bird* v. *Lee* (1901), 1 Ch., 715; *Prior* v. *Moore* (1901), 1 Ch., 936.

[3] *Neapcheah* v. *Ongcheng* (1875), L. R., 6 P. C., 381; *Limji* v. *Bapuji* (1887), I. L. R., 11 Bom., 441; *Fatmabibi* v. *Advocate-General* (1881), I. L. R., 6 Bom., 42; *West* v. *Shuttleworth* (1835), 2 Myl. & K., 684; *In re Blandell's Trusts* (1861), 30 Beav., 360; *Heath* v. *Chapman* (1854), 2 Drew, 417.

[4] *Richard* v. *Robson*, 31 Beav., 244; 31 L. J. Ch., 397.

[5] *Fowler* v. *Fowler*, 33 Beav., 616.

beneficial interest in the property which is devoted absolutely and in perpetuity to the religious purposes, in the latter case, the character of the property remains unchanged, and it is subject to the ordinary laws which regulate the devolution of property.[1] The same principle has been held applicable to religious endowments by Mahomedans, and, in a recent case before the Judicial Committee[2] which settled a controversy which had perplexed lawyers for half a century, it was authoritatively laid down that under the Mahomedan law, a perpetual family settlement expressly made as wakf is not legal, merely because there is an ultimate but illusory gift to the poor.

Characteristics of charitable use.

To summarise the above discussion, a charitable use must possess three characteristics: indefiniteness, meritoriousness, and perpetuity; in other words, it must be public and for indefinite individuals, it must be beneficial so that its donor may be regarded by the majority of mankind with the reverence due to a pious founder; and, lastly, it is usually intended to escape the fate of all other human institutions and to continue its work of beneficence forever.

Charitable gifts not void for remoteness.

We shall next proceed to examine the precise meaning of the statement that gifts to charities are not subject to the Rule against Perpetuities. Now, you will remember that the original, natural meaning of a 'perpetuity' is "an inalienable, indestructible interest." In this sense, all charitable trusts are perpetuities; there are no definite beneficiaries; the dedicated property is inalienable, because there is no one to alienate it; no one

[1] *Promotho* v. *Radhika* (1875), 14 B. L. R., 175; *Ashutosh* v. *Durga Churn* (1879), I. L. R., 5 Cal., 438; 6 I. A., 182.

[2] *Abul Fata* v. *Russomoy* (1894), L. R., 22 I. A., 76. In England it has been held that an immediate gift to poor relations is a private gift, but a perpetual trust for them is treated as a charitable gift for the poor with a preference for poor relations; see *Attorney-Genl.* v. *Sydney* (1869), L. R., 4 Ch. App., 722; *Gillam* v. *Taylor* (1873), L. R., 16 Eq., 581. As illustrations of charitable gifts for the benefit of the poor, see *Collinson* v. *Pater* (1831), 2 Russ. & M., 344; *Bruce* v. *Presbytery* (1867), L. R., 1 H. L. Sc., 96; *Attorney-Genl.* v. *Brandreth* (1842), 1 Y. & C. Ch., 200; *Attorney-Genl.* v. *Bovil* (1840), 1 Ch., 762.

has any alienable rights because no one has any rights at all. But you will also remember that the term 'perpetuity' has a secondary, artificial sense, namely, an interest which will not vest till a remote period, and this is the sense in which we use the term when we speak of the Rule against Perpetuities, which aims to prevent, not the alienation of present interests, but the creation of remote future interests. Now, although the very nature of charitable trusts makes them inalienable, and, therefore, perpetuities in the natural sense of the term, it does not by any means follow that they should be allowed to begin in the remote future, or, in other words, that they should be exempt from the operation of the Rule against Perpetuities; the law may have exempted them, but such exemption is not involved in the fundamental conception of a charity.

Six typical cases.

The question of remoteness may present itself in connection with charitable trusts in three shapes: a gift to a charity may be followed by a remote gift to an individual; a gift to an individual may be followed by a remote gift to a charity; and a gift to a charity may be followed by a remote gift to another charity—and, in each of these cases, there may or may not be a change of trustee. We have, therefore, six typical forms:

(i) To *A* on a charitable trust—on a remote contingency, to *B* for his own use.

(ii) To *A* on a charitable trust—on a remote contingency, in trust for *B*.

(iii) To *A* for his own use—on a remote contingency, to *B* on a charitable trust.

(iv) To *A* in trust for *B*—on a remote contingency, on a charitable trust.

(v) To *A* on a charitable trust—on a remote contingency, to *B* on another charitable trust.

(vi) To *A* on a charitable trust—on a remote contingency, on another charitable trust.

Cases I & II.

In the first two cases, where the gift is from a charitable trust over to an individual, the gift over to the individual is subject to the Rule against Perpetuities.

In the third case, where the gift is from an individual over to a corporation or person on charitable trust, the Rule against Perpetuities applies.[1] Case III.

In the fourth case, where a trustee who holds property in trust for an individual is directed, on the happening of a remote contingency, to hold it on a charitable trust, it may fairly be contended that no question arises as to the applicability of the Rule against Perpetuities which deals not with the termination but with the creation of estates; the mere fact that the first equitable estate ends at a remote period does not render the Rule against Perpetuities applicable; the only thing which can be thought to bring the case within the limits of the Rule, is that the charitable trust begins at a remote period, but, as no one has any rights under that trust, this apparently ought not to make the gift over obnoxious to the Rule. The contrary, however, has been decided by Sir Edward Sugden when Lord Chancellor of Ireland, and the better opinion certainly seems to be that limitations over to a charity do not differ from any other, but to be effectual must be confined within the usual period.[2] Case IV.

The first four cases, therefore, form no exception to the Rule against Perpetuities, but it is well settled that the remaining two cases, in which the change is from one charity to another are beyond the mischief of the Rule. The leading authority for this proposition is the case of *Christ's Hospital* v. *Grainger*,[3] where property was bequeathed to a corporation *A* upon certain charitable trusts, with a proviso that if the corporation failed for one year to apply the trust property in a proper manner, the property should be transferred to another corporation upon trust for the benefit of Christ's Hospital, a charitable institution. Corporation *A* having misapplied the property for more than a year, corporation *B* was held entitled to call for a transfer, on the ground that the Rule Cases V & VI.

[1] *Johnson's Trusts* (1866), L. R., 2 Eq., 716; *Attorney-Genl.* v. *Gill* (1726), 2 P. Wms. 368.

[2] 1841) *Commissioners of Donations* v. *De Clifford*, 1 Dr. & W., 245 (254).

[3] (1849) 1 Mac. & G., 460; 1 H. & Tw., 533; 19 L. J. Ch., 33.

against Perpetuities did not affect the validity of the proviso. Lord Chancellor Cottenham said: "It was then argued that it was void as contrary to the Rules against Perpetuities. Those rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain period. Is this effect produced and are these rules evaded by the transfer, in a certain event, of the property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account." [1]

Chamberlayne v. Brockett.

We shall next examine briefly the cases in which there is a gift to a corporation for a charitable object not preceded by a gift to an individual and the corporation is not in existence. The rule may shortly be stated to be that if a gift is made to a charity, contingent upon the happening of an event, which may by possibility be too remote, the gift to the charity is void; for if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject to the same rules and principles as any other estate dependant upon a condition precedent; if the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.[2]

[1] Professor Gray (§ 600) has pointed out that the passage quoted in the text ignores the distinction between perpetuity in the sense of inalienability and perpetuity in the sense of remoteness. Property dedicated to a charity is necessarily inalienable, but there is no good reason why a gift to charity should be allowed to commence in the remote future. If a remote gift to a charity after a gift to another charity is good, because they are by nature inalienable, then a gift to a charity after a gift to an individual ought to be good; for by parity of reasoning, the individual can alienate the whole of his present interest and the remote interest is no more and no less inalienable than when limited after a gift to another charity; yet a gift to a charity, after a gift to an individual, may be unquestionably bad for remoteness; see page 234, *ante*.

[2] (1872) *Chamberlayne* v. *Brockett*, L. R., 8 Ch. App., 206, 211, *per* Lord Chancellor Selborne, following *Cherry* v. *Mott* (1836), 1 Myl.

Cy près doctrine.

If, however, the gift is immediate and the whole property is devoted to charity, the gift will not fail for remoteness, merely because the particular purpose or application directed by the will, will not necessarily arise or become practicable within the limits of the rule. The Court is always anxious to favour charities, and when it finds that the particular way pointed out by the donor for carrying out his charitable purpose cannot be effectuated, it will carry it out *cy près* with due regard to the general charitable intention. Thus Lord Selborne laid down the law in the case to which I have just referred you: "The Rules against Perpetuities are to prevent in the cases to which they apply, property from being in- Lord Selborne. alienable beyond certain periods. But these rules do not prevent pure personal estate from being given in perpetuity to charity; and when this has once been effectually done, it is neither more nor less alienable, because there is an indefinite suspense or abeyance of its actual application or of its capability of being applied to the particular use for which it is destined. If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trusts, should turn out to be impracticable, the Court has power to apply the surplus or the whole, to such other purposes as it may deem proper, upon what is called the *cy près* principle; and it is upon this principle that charitable gifts to non-existent corporations or societies have been sustained in numerous cases."[1]

and Cr., 123(132), where Sir Charles Pepys, M. R., had laid down that there may no doubt be a conditional legacy to a charity as well as for any other purpose.

[1] *Atty.-Genl.* v. *Bishop of Chester* (1785), 1 Bro. C. C., 444; *Atty.-Genl.* v. *Bowyer* (1798-1803), 3 Ves., 714; 5 Ves., 300; 8 Ves., 256; 4 R. R., 132; *Atty.-Genl.* v. *Craven* (1856), 21 Beav., 392; *Martin* v. *Margham* (1844), 14 Sim., 230; *Hensham* v. *Atkinson* (1818), 3 Mad., 307; *Sinnet* v. *Herbert* (1872), L. R., 7 Ch. App., 232; *Chamberlayne* v. *Brockett* (1872), L. R., 8 Ch. App., 206. See also *Atty.-Genl.* v. *Downing* (1769), Wilmot, 1; Ambler, 550; Dickens, 414.

In this country, however, it has been held that the rule laid down in the Tagore case as regards gifts to persons who are not in existence at the time when the gift

we start with an exposition of the law as applicable to India.

Statute law.

As I had occasion to point out to you in previous lectures, the provisions relating to this and cognate matters, recently added to the Indian Statute Book,[1] have not been of any avail in defining and settling the law, inasmuch as they are expressly made inapplicable to Hindus; questions of great nicety and difficulty have, accordingly, been raised from time to time, and it can hardly be affirmed that they have yet been satisfactorily answered. In the first place, it has been maintained by eminent lawyers that a direction to accumulate is wholly contrary to the provisions of Hindu law. There is nothing in the original texts of Hindu law which throw any light on the matter, but having regard to the dicta of eminent Judges in a long series of cases, and having regard to the unquestionable fact that directions for accumulation are, from time to time, found in Hindu wills, it would be difficult to support the affirmative of the proposition I have just stated. In *Soorjeemoney Dossee* v. *Denobundo Mullick*,[2] the will of a Hindu testator who died in 1841, was under consideration, and the learned Judges of the Supreme Court at Calcutta, who heard the case in the first instance, made the following observations:

Soorjeemoney v. Denobundo.

"It was, we apprehend, competent to the testator, if he had been so minded, expressly to provide for the accumulation of the surplus income of his estate within the limits allowed by law, and to make their accumulations subject to the limitation over in the event of any son dying without leaving issue in the male line; but he does not appear to have done so, either expressly or by necessary implication."

Bissonauth v. Bamasoondery.

Again, in *Bissonauth Chunder* v. *Bama Soondery Dossee*[3] Lord Romilly, in delivering the judgment of the Judicial Committee, said:

[1] Indian Succession Act, sec. 104. Hindu Wills Act, sec. 3. Transfer of Property Act, secs. 2, 18. *See* p. 78, *ante*.

[2] (1857) 6 Moore I. A., 526 (536).

[3] (1867) 12 Moore I. A., 41 (61).

"In the first place, it is to be observed that the testator has given no direction to accumulate; it remains therefore to be seen whether the Court can find from the words of the will, as was argued, an irresistible inference that such was the intention of the testator. This is the more important because in the case of *Sonatun Bysack* v. *Juggut Soondree Dossee*[1] which is relied on as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to capital. There was an absence of that in this case. It is admitted that the testator could not dispose of the property of his son, or prevent the heir of the son from inheriting his property; therefore, the only question here is whether the testator has directed the accumulations of the property to be added to or made part of his own property, because if he has not, it was the property of the son, and the testator had no power of disposing of it. In this view of the case, their Lordships think that this will, on whichever construction it is taken, shows an absence of any direction to accumulate." Lord Romilly.

The cases I have just referred to certainly proceed on the assumption that a direction to accumulate is not necessarily and under all circumstances void; they do not, indeed, expressly decide that a direction to accumulate is good, but they show, at any rate, that the practice of directing accumulation is of long standing, and such directions have been regarded by the profession as capable of effective operation. In the absence, therefore, of any express provisions of Hindu law, invalidating trusts for accumulation, the question arises whether there is any principle of public policy which would discountenance accumulation; so far as I am aware, such a direction is in accordance with the modes of Hindu life and thought, and agrees in its aims with what is the every-day practice and custom in Hindu society. We start then with the assumption that trusts for accumulation are Trust for accumulation not necessarily bad.

[1] (1859) 8 Moore I. A., 66.

valid within the limits allowed by law, and we proceed to enquire within what bounds this power to direct accumulation can be exercised.[1]

Asima Krishna v. Kumar Krishna.

The leading authority upon this question is the case of *Asima Krishna Deb* v. *Kumar Krishna Deb*.[2] There a Hindu testator directed the creation of a trust for the accumulation of the surplus income (after certain annual payments), of his estate, for 99 years in the purchase of zemindaries, and empowered his trustees to continue such trust after the expiration of the term of 99 years ; the will contained no disposition of the beneficial interest in the zemindaries so to be purchased. The case was heard in the first instance by Mr. Justice Norman, who held that the trust was void. After pointing out that there was no disposition whatever of the beneficial interest in the bulk of the testator's property, the learned Judge went on to add : "No right is given to the manager for the time being, to apply the surplus profits of the zemindaries except for certain limited purposes designated in the will. Even at the end of ninety-nine years, there is no gift of the beneficial interest to any one. The manager for the time being may go on at his own will and pleasure, indefinitely accumulating the estate. No right is given to the heirs of the testator, or the parties indicated as such in the will, to use the property for their own benefit even at that remote time. The testator has, in fact, attempted to do that which Lord Hardwicke in *Hopkins* v. *Hopkins*[3] said the testator in that case would have done, if he could, but which no testator could do, namely, frame a will so that no one should take his estate. The trust for perpetual accumulation would deprive the parties of all enjoyment of the profits of the estate. I think it clear that the trust for accumulation must be treated as a condition repugnant to the natural right of

Lord Hardwicke.

[1] (1897) *Amrito Lall Dutt* v. *Surnomoye Dassee*, I. L. R., 24 Cal., 589. *See* also *Krishnarao* v. *Bena Bai* (1895), I. L. R., 20 Bom., 571 (585).

[2] (1868) 2 B. L. R., O. C. J., 11.

[3] (1738) 1 Atkyns, 589.

every owner of property to the use and enjoyment of it, inconsistent with the nature of property itself, and, therefore, void."[1] Upon appeal, this judgment was affirmed, Sir Barnes Peacock holding that although trusts were not unknown to Hindu law, a devise by a Hindu upon trusts which would be void as a condition, was void in the shape of a trust, and that the trust under which the profits of the estate were not to be beneficially used during a period of ninety-nine years but were to be laid out in the purchase of fresh estates under an arrangement which might be extended in perpetuity, was wholly void according to Hindu law. This conclusively establishes the invalidity of trusts for perpetual accumulation, as such directions to accumulate are attempts in disguise to create a perpetuity. On the same principle, it was held in a later case[2] that a trust for accumulation till the rents and profits amounted to three lakhs of rupees, was a trust for an illegal purpose, namely, the purpose of creating a perpetuity, and consequently void.

Trust for perpetual accumulation void.

The whole question was discussed in a recent case[3] before the Judicial Committee, where, it appeared, the intention of the testator was not to dispose of his estate, but to make a gift simply with reference to the enjoyment of the profits, with a view to create a perpetuity as regards the estate, and to limit for an indefinite period the enjoyment of the profits of it. The disposition was held invalid, and Sir Richard Couch, in delivering the judgment of the Judicial Committee, said: "The question is, what was the intention of the testator in this provision of his will? He says distinctly, 'My estate shall remain intact' and then he proceeds to say, as regards the enjoyment of the property, the estate remaining intact, my heirs, sons, &c., 'shall be entitled to enjoy the profits thereof.' These words appear to their Lordships to indicate that

Sookhmoy v. Monohari.

[1] 2 B. L. R., O. C. J., 29.

[2] *Krishnaramani Dasi* v. *Ananda Krishna Bose* (1869), 4 B. L. R., O. C. J., 231 (277).

[3] *Sookhmoy Chunder Dass* v. *Monohurri Dasi* (1885), 12 I. A., 103.

Sir Richard Couch.

he was not going to give away the estate, but that all he intended was to give the enjoyment of the profits to the persons mentioned in the will. His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it, which would not be allowed by Hindu law. It is true, if the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will, and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate, and has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will."

Lower limit of trust for accumulation.

As regards the lower limit within which a trust for accumulation may be validly created, it is to be remarked that the authorities in this country are singularly meagre; but, upon principle, it seems at first sight reasonable that the limits to the accumulation of the annual income and the creation of future estates and interest in property should be identical; in other words, that which is not too remote a period for the suspension of the acquisition of full power over the corpus of property, ought not also to be too remote for the accumulation and consequent deprivation of the beneficial enjoyment of the accruing profits. But it may be urged, with considerable force, that it is one thing to determine unalterably who shall enjoy certain property for the period of time limited by the Rule against Perpetuities, and that it is a far more serious thing to direct that trustees shall, during that period, receive and put away the income of the property beyond the reach of human enjoyment. But, as you will presently see, the limits in the two cases were co-extensive under the law in England

until the commencement of the present century,[1] and, in a recent case,[2] Mr. Justice Jenkins held, with regard to the will of a Hindu, that if accumulations are permissible, then in the absence of special provision, the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator. You will not fail to observe that even the adoption of this rule leaves the matter of necessity uncertain, inasmuch as the limits of the rule against remoteness as applicable to Hindus have not yet been judicially defined with precision.[3]

Amrito v. Surnomoye.

Cases to which the provisions of the Indian Succession Act and the Transfer of Property Act apply are

[1] The modification introduced by the Thellusson Act will be explained later on.

[2] *Amrito Lall Dutt* v. *Surnomoye Dasee* (1897), I. L. R., 24 Cal., 589, (615). The judgment of Mr. Justice Jenkins in this case was reversed upon appeal on another point; *see* (1898), I. L. R., 25 Cal., 662. This was affirmed by the Judicial Committee (1899), I. L. R., 27 Cal., 996. In the Court of Appeal, Trevelyan, J., made the following observations upon the question of accumulation: "The question is whether a Hindu testator can direct the accumulation of the income of his property for an indefinite or any time without providing for the beneficial interest. The circumstance that the property has been given to trustees is wholly immaterial. A Hindu testator cannot create by a trust an interest which he is otherwise incapable of creating. One of the best known of the several important principles which were enunciated in the *Tagore Case* was that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that a trust can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognises. As I understand the Hindu law, there must be a present beneficial interest created in property in order to render the gift, whether under a will or *inter-vivos*, valid. I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate. The fact that in cases, where there is a minor beneficiary, accumulation can be allowed and that it may be possible to accumulate income for the purpose of paying debts, does not to my mind help us. In the former case, accumulation is rendered necessary by the incapacity of the beneficiary and is allowed, in order that we may obtain the greater benefit from the gift that is made to him. In the latter case, the direction to accumulate, is in aid of the proper administration of the testator's estate, and is sometimes necessary for the due performance of his legal and moral obligation to pay his debts. I. L. R., 25 Cal., 691.

[3] Lect. III, p. 73, *ante*.

Indian Succession Act, Sec. 104.

tolerably free from difficulty. Section 104 of the Indian Succession Act provides that "a direction to accumulate the income arising from any property, shall be void, and the property shall be disposed of as if no accumulation had been directed;" to this general rule is added the exception that "where the property is immovable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death, and at the end of the year, such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made, had elapsed." The following five illustrations are added to the section :

Illustrations.

(*a*) The will directs that the sum of ten thousand rupees shall be invested in Government securities and the income accumulated for twenty years, and that the principal, together with the accumulations, shall then be divided between *A*, *B* and *C*. *A*, *B* and *C* are entitled to receive the sum of ten thousand rupees at the end of the year from the testator's death.

(*b*) The will directs that ten thousand rupees shall be invested, and the income accumulated until *A* shall marry, and shall then be paid to him. *A* is entitled to receive ten thousand rupees at the end of a year from the testator's death.

(*c*) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulations shall then be paid to the eldest son of *A*. At the death of the testator, *A* has an eldest son living named *B*. *B* shall receive at the end of one year from the testator's death the rents which have accrued during the year,

together with any interest which may have been made by investing them.

(*d*) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall then be paid to the eldest son of *A*. At the death of the testator, *A* has no son. The bequest is void.

(*e*) *A* bequeaths a sum of money to *B*, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At *A's* death the legacy becomes vested in *B*; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of *A's* minority.

Transfer of Property Act, Sec. 18.

The provisions of the Transfer of Property Act (Sec. 18) are similar: "Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed." To this general rule, is added the exception that "where the property is immovable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made, had elapsed." The exceptions in both the sections are not very clearly worded; there are apparently two cases where accumulation is permissible, namely, *first*, where the property is immovable, *secondly*, where accumulation is directed to be made from the death of the testator or from the date of the transfer, and in each of these cases, the direction to accumulate is valid in respect

Exceptions.

only of the income arising from the property during the year next following. If the property is movable and there is a direction to accumulate the profits arising therefrom for a period not running from the death of the testator or the date of the transfer, though ending within a year calculated from that date, the direction would be void; a similar direction would seemingly be valid in the case of immovable property.

Principles of English Law.

We shall now proceed to examine the leading principles of the law as administered in England, where, you will recollect, until the close of the eighteenth century, restraint upon the accumulation of income was co-extensive with restraint upon the creation of future interest in property. In other words, when a settlor or testator directs income to be accumulated and it is a condition precedent to the right of enjoyment of the income that the period fixed for the determination of accumulation should arrive, then if this period may fall beyond the limits of the Rule against Perpetuities, the gift of the accumulated income is too remote. The leading authority for this proposition is the celebrated case of *Thellusson* v. *Woodford*,[1] where it was held that a trust under a will to accumulate the income of property until the death of the survivor of a class of persons named or described, to be born either actually or in the contemplation of law, in the lifetime of the testator, is good. I must ask you all to read the original report of this case, not only because it immediately led the Legislature to interfere and considerably restrict the limits within which accumulation was permissible, but also because the case was made the occasion for forensic display such as is rarely witnessed in civil actions. The case arose upon the construction of the will of Peter Thellusson, who died in 1797, having devised all his property to trustees to accumulate the income during the lives of all his sons, grandsons, and grandsons' children, who were living at his death, and then at the

Thellusson v. Woodford.

[1] (1798—1805) 4 Ves., 227; 11 Ves., 112; 8 R. R., 104; 1 R. C., 498.

death of the survivor, to transfer the property in three lots to the then living eldest male descendants of his three sons. The validity of this extraordinary disposition was sustained by the Courts, on the principle that the law allowed and the Court would undertake the accumulation of income during the full period to which the alienation of the corpus of property could be suspended. Before I proceed to deal with the Act which was passed in consequence of this decision, it is desirable to point out that a trust for accumulation which violates the Rule against Perpetuities, is wholly void, and cannot be executed in part; if it is bad to the extent in which it is given, you cannot model it to make it good.[1] Thus, for instance, if there be a direction in a will to accumulate the income of property for fifty years, and at the end of the time pay the accumulated fund to those who shall then be the heirs of the testator, the gift is clearly void as it may come into operation beyond the limits of the rule (namely, a life in being at the death of the testator and twenty-one years after) and consequently those persons will be entitled to the property who would have been entitled to it, had the direction to accumulate and the gift of the accumulated fund both been entirely omitted from the will. The gift of the accumulated fund is void; the direction to accumulate also becomes nugatory, and this, for either of two reasons; first, it may be said that the trust to accumulate exists only for the sake of the gift of the accumulated fund, and as the gift fails, the trust necessarily fails with it; or, secondly, it may be said, that the trust to accumulate exists, but as subject to this trust, the property is in the heir or next-of-kin, or residuary devisee or legatee, such person may at once terminate the trust; for, when the person to whom the accumulated fund is to be paid has a vested indefeasible right to the possession of the principal or the accumulations, the direction to accumulate is really an

Violation of Rule against Perpetuities.

Violation of Thellusson Act.

[1] *Southampton* v. *Hertford* (1813), 2 Ves. & Bea., 54; 1 R.C., 514.

illegal restraint on alienation and may be avoided at any time. In other words, the direction to accumulate, being destructible at any time, is not too remote. This seems to be the principle upon which the House of Lords, in *Tregonwell* v. *Sydenham*[1] sustained a trust to accumulate which might last sixty years, as the trust could be terminated at any time by the heir in whose favour there was a resulting trust. But, although all the members of a class might be entitled within the limits of the Rule against Perpetuities to stop an accumulation by their joint action and alienate the fund, this will not, by itself, be sufficient to take the case out of the mischief of the rule, unless the relative rights of the members of the class are also ascertained within that period.[2] The same principle is applicable when income is directed to be accumulated for the payment of a testator's debts[3]; this gives the creditors an immediate present charge on the property, and they can stop the accumulation at once; hence, the trust for accumulation, being destructible, is not void for remoteness;[4] a direction to accumulate the rents with a view to pay a legacy to a person in being, stands on the same footing.[5]

Tregonwell v. Sydenham.

[1] (1814-15) 3 Dow, 194.

[2] *Curtis* v. *Lukin* (1842), 5 Beav., 147.

[3] Under the Indian Statutes, no exception is made in favour of provisions for the payment of debts or for raising portions for children.

[4] *Southampton* v. *Hertford* (1813), 2 Ves. & Bea., 54 (65). With regard to the construction to be put upon the second section of the Thellusson Act which exempts provisions for payment of debts from the operation of the statute, see *Barrington* v. *Liddell* (1852), 2 DeG. M. & G., 480 (496), where Lord St. Leonards observed: "The Legislature meant that a man should, within the limit allowed by law (that is, the Rule against Perpetuities), be able to provide not only for his own debts but for the debts of such other persons as he should think fit, it being perfectly certain that the power was one which it would not be very dangerous to entrust to anybody. It is clear also that the provision as to debts must relate to past debts, and nobody can deny that, a man being able by his will, under this Act, to provide for his debts generally, this will include his future debts." *See* also *Mason* v. *Mason* (1891), 3 Ch., 467; *Vine* v. *Raleigh* (1891), 2 Ch., 13, the first of which cases shows that an accumulation for keeping leasehold properties in repair is valid and the second shows that an accumulation for improvements is outside the Thellusson Act.

[5] *Williams* v. *Lewis* (1859), 6 H. L. C., 1013. Parties who are

I shall conclude this lecture with a brief account of the provisions of the Thellusson Act,[1] provisions which Thellusson Act.

entitled to a vested interest in funds, can, when adult, have the accumulations stopped and demand the immediate payment of such funds to themselves, and this is equally the case where the bequest is to a charity, see *Saunders* v. *Vautier* (1841), 4 Beav., 115; *Coventry* v. *Coventry* (1865), 2 Dr. & Sm., 470; *Gosling* v. *Gosling* (1862), Johnson, 263; *Wharton* v. *Masterman* (1895), A. C., 186. Where, however, accumulation of rents is directed for discharge of incumbrances, a person who absolutely becomes entitled to the property, is not necessarily entitled to stop the accumulations. See *Fitzgerald* v. *White* (1887), 37 Ch. D., 18; *Freewen* v. *Land* (1896), 2 Ch., 511; *Pristley* v. *Ellis* (1897), 1 Ch., 489.

[1] 39 & 40 Geo. III., c. 98 (1800). The Act recites that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof were directed to be accumulated and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereinafter contained, and provides in sec. 1: "That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; or the term of twenty-one years from the death of any such grantor, settlor, devisor or testator; or during the minority Sec. 1. or respective minorities of any person or persons, who shall be living, or *en ventre sa mere* at the time of the death of such grantor, devisor or testator; or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Sec. 2 of the Act provides: Sec. 2. "That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor or devisor, or other person or persons or to any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions

are unfortunately often clothed in language inartificial and ill-defined.[1] Like the Rule against Perpetuities, the Thellusson Act is not a rule of construction, but a positive command of law, the object of which is to defeat intention; it is, therefore, essential to have a clear conception of the different terms for which, under the Statute, income may be accumulated and the beneficial enjoyment of property postponed. Four periods are expressly mentioned: *First*, the life of the settlor; *second*, the term of twenty-one years from his death;[2] *third*, during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mere* at the death of the settlor;[3] *fourth*, during the minority or respective minorities of any person or persons who, if of full age, would be entitled to the income directed to be accumulated.[4] It is

Four periods.

shall, and may be made and given as if this Act had not passed."

Sec. 3. Sec. 3 of the Act, which has been repealed by 11 & 12 Vict., c. 36, sec. 41, provided that the Act was not to extend to any disposition of heritable property in Scotland.

Sec. 4. Sec. 4 of the Act provided that it was not to apply to wills made before the Act, unless the testator should be living and be of sound disposing mind for twelve calendar months from the passing of the Act.

See also the Accumulation Act, 1892 (55 & 56 Vict., c. 58), the first ection of which provides that, "no person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation, would, for the time being, if of full age, be entitled to receive the rents, issues, profits or income so directed to be accumulated."

[1] *Per* Lord Chancellor Brougham, in *Shaw* v. *Rhodes* (1835), 1 Myl. & Cr., 135 (141). *See* also *Thellusson* v. *Woodford* (1805), 11 Ves., 112 (148); *Bridgnorth* v. *Collins* (1847), 15 Sim., 538 (541); *Ellis* v. *Maxwell* (1841), 3 Beav., 587 (596); *Barrington* v. *Liddell* (1852), 2 DeG. M. & G., 480 (497); *Edwards* v. *Tuck* (1853), 3 DeG. M. & G., 40 (55); *Tench* v. *Cheese* (1855), 6 DeG. M. & G., 453 (460).

[2] See *Bengough* v. *Edridge* (1827), 1 Sim., 173; *Lewes* v. *Lewes* (1833), 6 Sim., 304; *Scott* v. *Scarborough* (1838), 1 Beav., 154; *Garst* v. *Lowndes* (1841), 11 Sim., 434.

[3] See *Johnson* v. *Johnson* (1837), 1 Keen, 648; *Harrison* v. *Harrison* (1837), 1 Keen, 765; *Kime* v. *Welfitt* (1830), 3 Sim., 533; *Arnott* v. *Bleasdale* (1831), 4 Sim., 387; *Hulme* v. *Hulme* (1839), 9 Sim., 644; *Easum* v. *Appleford* (1839), 10 Sim., 274.

[4] See *Haley* v. *Bannister* (1819), 4 Madd., 275; *Ellis* v. *Maxwell* (1841), 3 Beav., 587; *Bryan* v. *Collins* (1852), 16 Beav., 14; *Sydney* v. *Wilmer* (1863), 4 DeG. J. & S., 84.

to be noticed in the first place that accumulation will be allowed only for one of the periods named above, that is, the four periods are alternative and not cumulative; for example, a direction to accumulate income for twenty-one years after the testator's death, and, thereafter during certain minorities, is good only for the twenty-one years.[1] In the second place, a provision which is good so far as the Rule against Perpetuities is concerned, but violates the Thellusson Act, is void only for the excess;[2] thus if there be a direction in a will to accumulate the income during the life of *A*, it can be accumulated for twenty-one years from the death of the testator. Similarly if accumulation be directed for twenty-four years or until a legatee, then unborn, attains twenty-one, the accumulation is good for twenty-one years. But the Thellusson Act does not render valid *pro tanto* a provision for accu-

Alternative not cumulative.

Excess only void.

The fourth period mentioned in the Statute seems to meet the case of a testator leaving property for a married sister for life, and at her death to be divided amongst her children, with a proviso, that if at her death any child be under age, its share shall be retained until its majority, and that so much of the income of the share as is not required for its maintenance, be accumulated and paid over with the share at majority; the sister might have a child born after the testator's death, and then there would be an accumulation during the minority of a person not in being at the testator's death, assuming that the sister died during that child's minority.

[1] *Wilson* v. *Wilson* (1851), 1 Sim., N. S., 288; *Jagger* v. *Jagger* (1883), 25 Ch. D., 729. See also *In re Rosslyn's Trust* (1848), 16 Sim., 391; 18 L. J., Ch., 98, which shows that the same construction must be put upon the Statute, when the accumulation is directed by a deed as by a will.

[2] *Griffiths* v. *Vere* (1803), 9 Ves., 127; *Longdon* v. *Simson* (1806), 12 Ves., 295; *In re Rosslyn* (1848), 16 Sim., 391. It has been held, that the words of the Act allowing accumulation during the minority of a person mean the minority of a person *in esse*; consequently a direction to accumulate, during the minority of a person unborn at the death of the testator, authorises accumulation for twenty-one years only from the death of the testator and is void beyond that period: *Longdon* v. *Simson* (1806), 12 Ves., 295; *Haley* v. *Bannister* (1819-20), 4 Madd., 275; *Ellis* v. *Maxwell* (1841), 3 Beav., 596. Similarly it has been held that where there is a direction to accumulate until the children of certain persons born during the life of the testator, shall attain twenty-one, a child *en ventre sa mere* will not be included among the number of such children for the purpose of postponing the period of distribution. *Blasson* v. *Blasson* (1864), 2 DeG. J. & S., 665.

Leake v. *Robinson.*

mulation which violates the Rule against Perpetuities ;[1] and the reason for this distinction is thus explained by Sir William Grant:[2] "The Act introduced a restriction on a liberty antecedently enjoyed, and, therefore, it was only to the extent of the excess that the prohibition was transgressed ; whereas executory devise is itself an infringement of the rules of the common law, and is allowed

Boughton v. *James.*

[1] *Boughton* v. *James* (1844), 1 Coll., 26 (45), where Vice-Chancellor Knight Bruce said : "Before the Accumulation Act, a testamentary trust or direction to accumulate, so worded as to last or be capable of lasting beyond the compass of all lives in being at the testator's death and twenty one years after the death of the survivor of those lives, would have been illegal and void for the whole, and such a trust or direction is not less illegal or less void since the Accumulation Act." See *Marshall* v. *Holloway* (1818-20), 2 Swanst., 432, where Lord Eldon observed : "The true doctrine seems to be that of a trust for accumulation, which, prior to Lord Loughborough's Act, would have been good, so much as is now within the Act, will be good, but the excess will be bad ; but if there be a trust for accumulation, and part of it would have been bad before the Act, that part remains bad notwithstanding the Act." Cf. *Southampton* v. *Hertford* (1813), 2 Ves. & Bea., 54 ; 13 R. R., 16 ; where Sir W. Grant, M. R., held that a trust for accumulation which may extend beyond the period allowed by law, without reference to the statutory restrictions under the Thellusson Act, is entirely void, and consequently in a strict settlement of real estate, the trust of a term, declared to be for the purpose of accumulating the rents during the minorities of the respective tenants for life or in tail, is bad. *See* also *Crawley* v. *Crawley* (1835), 7 Sim., 427 ; *Pride* v. *Fooks* (1839), 2 Beav., 430 ; *Miles* v. *Dyre* (1837), 8 Sim., 330 ; *O'Neill* v. *Lucas* (1838), 2 Keen, 313; *Eyre* v. *Marsden* (1838), 2 Keen, 564 ; *Williams* v. *Nixon* (1840), 2 Beav., 472 ; *Blease* v. *Burgh* (1840), 2 Beav., 221 ; *Ellis* v. *Maxwell* (1841), 3 Beav., 587 ; *Shaw* v. *Rhodes* (1835), 1 Myl. & Cr., 135 ; *Curtis* v. *Lukin* (1842), 5 Beav., 147 ; 1 H. L. C., 406 ; *Scarisbrick* v. *Skelmersdale* (1849), 17 Sim., 187 ; *Turvin* v. *Newcomb* (1856), 3 Kay & J., 16 ; *Williams* v. *Lewis* (1859), 5 Jur. N. S., 323 ; *Oddie* v. *Brown* (1859), 4 DeG. & J., 179 ; *Browne* v. *Houghton* (1846), 14 Sim., 369, in which last case, Shadwell, V.C., held, that where a testator had devised his estates in trust for *A* for life, remainder to his first and other sons in tail-male, with remainders over, and had further directed that if any person for the time being entitled to the possession of the estates, should be under twenty-one, the trustees should receive the rents and apply a competent part for maintenance, and accumulate the residue, the trust for accumulation was wholly void for remoteness. *See* also *Cochrane* v. *Cochrane* (1883), 11 L. R. Ir., 361 ; *Smith* v. *Cunningham* (1884), 13 L. R. Ir., 480.

Marshall v. *Holloway.*

Southampton v. *Hertford.*

[2] *Leake* v. *Robinson* (1817), 2 Mer., 363 ; see also *Marshall* v. *Holloway* (1818), 2 Swanst., 432 (450), *per* Lord Eldon.

only on condition of its not exceeding certain established limits; if the condition be violated, the whole devise is held to be void."

Graphic illustration.

This fundamental distinction between the infringement of the provisions of the Thellusson Act and of the Rule against Perpetuities, may be very effectively illustrated by the help of the graphic method which is familiar to students of the natural and physical sciences. Draw two concentric circles, of which the inner one represents the boundary of the rule laid down in the Thellusson Act, and the outer one represents the boundary of the Rule against Perpetuities. Through the centre O, draw a line OABC intersecting the circles in the points A and B, and another line OXY intersecting the inner circle only in X, but not reaching up to the circumference of the outer circle. If OC represents a direction for accumulation, it is wholly void and not good even up to the extent OA, inasmuch as it violates not only the provisions of the Thellusson Act, but also the Rule against Perpetuities. On the other hand, if OY represents another direction for accumulation, it is good up to the extent OX, and the part XY alone is bad and must be rejected, inasmuch as it violates the provisions of the Thellusson Act, but does not fall within the mischief of the Rule against Perpetuities.

Thellusson Act, Sec. 1.

I may point out that the provisions of the first section of the Thellusson Act are applicable not only where accumulation is directed in express terms, but also where accumulation necessarily takes place by reason of the form in which the property is given; for example, where a contingent executory bequest is made which is liable to be divested by the birth of issue, accumulation, were it not forbidden by the Act, must take place until the contingency should be determined.[1] Where, however, property

[1] *Macdonald* v. *Bryce* (1838), 2 Keen, 276; *Shaw* v. *Rhodes* (1835), 1 Myl. & Cr., 135; on appeal, *Evans* v. *Hellier* (1837), 5 Cl. & F., 114; *Morgan* v. *Morgan* (1850), 4 DeG. & Sm., 164; *Tench* v. *Cheese* (1855), 6 DeG. M. & G., 453 (461), *per* Cranworth, L. C.: *Bective* v. *Hodgson* (1864), 10 H. L. C., 656; *Wade-Gery* v. *Handley* (1876), 1 Ch. D., 653;

to the next-of-kin of the testator,[1] and in case it arises from real property, to his heir-at-law.[2] Where, however, the direction to accumulate for certain beneficiaries is followed by an ultimate gift of residue, the residuary legatees under the ultimate gift become entitled to the income, so unlawfully directed to be accumulated.[3]

Thellusson Act, Sec. 2.

We may now briefly consider the second section of the Act which exempts three classes of provisions from its operation. In the first place, any provision for the payment of debts is not affected by the Act. This includes, as I have already pointed out to you,[4] the debts of persons other than those making the provisions; the accumulation, however, must be *bonâ fide* for paying debts only[5] and not merely a colourable evasion of the statute. In the second place, any provision for raising portions for any child of the grantor or any child of any person taking any interest under the settlement, is also beyond the mischief of the rule. It is not necessary to trouble you with a catalogue of the authorities[6] in which questions have been raised as to what should be deemed "portions" within the meaning of the Act, but you must remember that a gift of the whole of a testator's estate or of a residue comprising the bulk of it, is not a portion.[7] It has further been held, that the children must be legitimate; if any are illegitimate, the whole gift is within

[1] *McDonald* v. *Bryce* (1838), 2 Keen, 276; *Pride* v. *Fooks* (1839), 2 Beav., 430; *Elborne* v. *Goode* (1844), 14 Sim., 165; *Wilson* v. *Wilson* (1851), 1 Sim., N. S., 288; *Bourne* v. *Buckton* (1851), 2 Sim., N. S., 91; *Simmons* v. *Pitt* (1873), 8 Ch. App., 978; *Vine* v. *Raleigh* (1896), 1 Ch., 37.

[2] *Halford* v. *Stains* (1849), 16 Sim., 488; *Wildes* v. *Davies* (1853), 1 Sm. & G., 475. For the case of mixed funds, see *Burt* v. *Sturt* (1853), 10 Hare, 415; *Ralph* v. *Carrick* (1877), 5 Ch. D., 984.

[3] *Crawley* v. *Crawley* (1835), 7 Sim., 427; *O'Neill* v. *Lucas* (1838), 2 Keen, 313; *Ellis* v. *Maxwell* (1841), 3 Beav., 587.

[4] *See* page 254, *ante*, but *see* the contrary opinion of Turner, V. C., in 10 Hare, 429 (434).

[5] *Mathews* v. *Keble* (1869), L. R., 3 Ch. App., 691.

[6] *Jones* v. *Maggs* (1852), 9 Hare, 607; *Beech* v. *St. Vincent* (1850), 3 DeG. & Sm., 678.

[7] *Eyre* v. *Marsden* (1838), 2 Keen, 564; *Bourne* v. *Buckton* (1851), 2 Sim., N. S., 91; *Wildes* v. *Davies* (1853), 1 Sm. & G., 475; *Burt* v. *Sturt* (1853), 10 Hare, 415; *Edwards* v. *Tuck* (1853), 3 DeG., M. & G., 40.

the mischief of the Act.[1] In the third place, any direction for accumulation touching the produce of timber or wood is valid, but such direction must not exceed the limits prescribed by the Rule against Perpetuities.[2] Thellusson Act, Sec. 2.

[1] *Shaw* v. *Rhodes* (1835), 1 Myl. & Cr., 135 (159).

[2] *Ferrand* v. *Wilson* (1845), 4 Hare, 344.

LECTURE XII.

Restraints on the Alienation of Property.

Restraints on alienation.

In the present lecture, I purpose to examine the rules which regulate the imposition of restraints upon the alienation of property; but before I do so, it is desirable to explain to you clearly the precise relation in which this department of the Law of Perpetuities stands to that branch which has so long engaged our attention. You will be able to recall to your minds without any difficulty that in the very first lecture,[1] where we determined the nature of the Law of Perpetuities and its precise place in jurisprudence, I pointed out to you that a perpetuity can arise in two ways, first, by taking away from the owner the power to alienate property, and, secondly, by allowing the creation of remote future interests. I also explained to you that in the early stages of the development of the law, these ideas are apt to be confounded; but gradually as they are differentiated, the first gives rise to the rule forbidding restraints on alienation, the second gives rise to the rule against remoteness which is, to our great inconvenience, miscalled the Rule against Perpetuities. It has been a famous topic of controversy among eminent jurists whether the second rule is merely a form of the first; in other words, is a remote future interest objectionable *only* because for too long a period there may be no one who can give a good title, or, is it objectionable *also* because the policy of the law does not allow interests so uncertain in value to hamper a present ownership. It is hardly necessary to point out that in one sense, it may be

Two-fold origin of perpetuity.

Rule against remoteness.

[1] P. 18, *ante*.

perfectly correct to say that the Rule against Perpetuities aims at restraints against alienation, for executory devises and other future interests diminish the marketable value of an estate, and, to this extent, the rule which limits the creation of such future interests, does indirectly favour alienation. But, speaking strictly, a future interest is not a restraint on the alienation of an estate unless the contingency upon which the future interest depends, is itself the alienation of the estate ; the owner of an estate, subject to a future interest can grant all that he has got, and the grantee has every thing that the grantor would have had if the transfer had not been made. The real question at issue, however, is, not whether the Rule against Perpetuities prevents property from being inalienable, but whether that is the foundation of the rule ; in other words, does the validity or invalidity of an interest depend solely on whether the alienability of the property is affected, or on whether the interest depends upon a remote condition. To put the matter, if possible, still more clearly, the alternative propositions are, first, that the Rule against Perpetuities is only aimed at preventing the non-alienation of property, and, second, the true object of the Rule against Perpetuities is to restrain the creation of future conditional interests ; or, to state it still more briefly, do or do not inalienable interests come within the mischief of the rule ? The real difficulty in furnishing a satisfactory solution of these questions, in whichever of the manifold forms you may take them, is traceable to the peculiar manner in which the Rule against Perpetuities was developed. In the course of my examination of the origin and history of the rule in English law, I pointed out to you that its first suggestions were made in a somewhat vague and formless condition, and, that before it took its final shape, its limits were stated, by successive generations of lawyers and judges, sometimes too narrowly, and at others, too broadly. It is not unnatural, therefore, that during this process of slow judicial development, statements were often made and theories often advanced in

Two alternative propositions.

Judicial development of law of perpetuities.

reported cases, which are not in entire harmony with the principles as finally developed ; and it is equally natural that even after the doctrine has been settled, these early statements and theories survive and are loosely repeated, though they cannot be reconciled with what are acknowleged to be the true principles. You will not be surprised, therefore, to find upon an examination of the cases reported in the books, that there are expressions here and there, specially in the older cases, which may be relied upon in support of the view that the Rule against Perpetuities aims only against the tying up of property.[1] Such expressions, however, when they occur in cases where the decision would be the same, whichever principle was adopted, are not only not decisive, but, indeed, of very little value. There are cases, on the other hand, in which the rule has been applied, although there was no tying up of property ; such cases, clearly, are inconsistent with the theory that if future interests can be alienated or released, they cannot be too remote, and that the rule is aimed only against such limitations as tie up property and take it absolutely out of commerce. Thus, although a conditional limitation to an unascertained person cannot be released because there is no one to release it, yet when a conditional limitation is to a known person and his heirs, and the contingency is only in the happening of the event on which the conditional limitation is to take effect, it may be released ; but, if such event may occur more than twenty-one years after lives in being, the conditional limitation has been held too remote and consequently void. To take one example, a bequest of personalty, whether to a living person or to a corporation, is too remote, if it is to take effect after the failure of issue of *X*.[2] Similarly, if the persons to whom a gift is made may not be ascertained within the required limits,

Conflicting decisions.

[1] *See*, for instance, *Scattergood v. Edge* (1699), 1 Salk., 229, p. 35, *ante*.

[2] *Grey* v. *Montagu* (1764), 2 Eden, 205 ; 3 Brown P. C., 314 ; *Johnson's Trusts* (1866), L. R., 2 Eq., 716. As to conditional limitation of real estate, see *Brown and Sibly's Contract* (1876), 3 Ch. D., 156.

the gift is too remote, although the class to which they belong may be determined within those limits, and a conveyance by all the members of the class would pass the entire interest.[1] It is unnecessary to refer to other illustrations in support of the same view, and I would now ask your attention to two or three recent cases which tend to support the opposite theory and to examine how far they can be supported on principle. In *Gilbertson* v. *Richards*,[2] there was a mortgage to *A* to secure the payment of £5,000; *B* was entitled to the equity of redemption; the mortgage-deed, executed in 1838, provided that upon default of payment of the principal amount, *A* might sell the land, but that if the mortgagees or their representatives should, in exercise of their powers under the deed, enter upon or otherwise become possessed of the land, the land should immediately become charged with a rent of £40 in favour of *B*. The contingency contemplated happened; there was a default, and *A* sold the land in 1847. *B* contended that thereupon the rent arose, while the purchaser contended that the provision for its creation was void for remoteness. The Court of Exchequer held that the rent was duly created, and was not open to the objection of remoteness, inasmuch as the mortgagors could release their right to the rent-charge.[3]

Gilbertson v. *Richards.*

[1] *In Edmondson's Estate* (1868), L. R. 5 Eq., 389, *per* Wood, V.C., *Hobbs* v. *Parsons* (1854), 2 Sm. & G., 212, *per* Stuart, V.C.; *Courtier* v. *Oram* (1855), 21, Beav., 91; *Garland* v. *Brown* (1864), 10 L. T. N.S., 292. Cf. *Curtis* v. *Lukin* (1842), 5 Beav., 147, which was a case of a provision for accumulation, held bad for remoteness.

[2] (1859) 4 H. & N., 277; 5 H. & N., 453, p. 126, *ante*.

[3] "It seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in Billings and his heirs. He or his heirs may sell it, or release it at their pleasure. A rent in fee-simple may be granted to a man and heirs to continue for ever. Why, therefore, may not one be granted to commence at any time however remote? It is only a part of the estate in fee-simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee-simple, who may deal with it at his or their pleasure, and as he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency

The Court of Exchequer Chamber, however, where the case was subsequently carried, rested their decision, on a very different ground, namely, that the case was analogous to that of the power of sale by a mortgagee and said: "The real effect of the limitations in the deed before us, is, that the mortgagees are to take possession or sell, subject to the payment of this rent to Billings. It is a restriction on the amount of the estate of the mortgagees and seems within the cases as to the power of sale in a mortgagee, which, as incidental to his estate, is held not to be within the Rule as to Perpetuities."[1] Unfortunately, the Court of Exchequer Chamber not only did not repudiate the doctrine of the Exchequer, but used language which left the matter doubtful.[2] It is not a matter for surprise, therefore, that this decision was relied upon in a later case[3] by an eminent Judge in support of the proposition that an executory interest which could be released was not affected by the Rule against Perpetuities. In that case, the vendor of some lands, reserving the mines, covenanted with the purchaser that should he ever sell the mines under the adjoining land, he would sell the reserved mines to the purchaser at the same rate as that at which he should have sold the adjoining mines; it was contended that the covenant was bad for remoteness, but Fry, J., overruled the objection and held that

Birmingham Canal Co. v. Cartwright.

which may never happen, or may happen at any time however distant," 4 H. & N., 297.

[1] 5 H. & N., 459. *See* also Sugden on Powers (8th ed.), 16, where it is said: "No perpetuity was created by the power of sale in the mortgagees, or by the right of them or their heirs to take possession of the land, but in exercising that right, they took, subject to a perpetual rent of £40 a year in favour of the mortgagor. It was a charge on the estate and had no tendency to a perpetuity." The actual decision may also be supported on the ground that the future right to the £40 annually was not a present right of property, but simply a contractual obligation, and, consequently, beyond the mischief of the rule.

[2] "There may be considerable doubt also on the point raised by counsel, whether the rule as to perpetuities applies to a case like the present, where the party who or whose heirs are to take, is ascertained, and who can dispose of, release or alienate the estate." 5 H. & N., 459.

[3] *Birmingham Canal Co.* v. *Cartwright* (1879), 11 Ch. D., 421.

specific performance could be enforced by the assignees of the purchaser against the devisees of the vendor.[1] But this decision has been overruled by the Court of Appeal in a very instructive case of great importance, *London and S. W. R. Co.* v. *Gomm*,[2] which clearly stated the true doctrine that an option to buy on a remote contingency is bad. In this case, the plaintiff Company in 1865 conveyed land to Powell in fee, and Powell covenanted with the company that he, his heirs or assigns, would, at any time, on receipt of £100, reconvey the land to the company. In 1879, Gomm purchased the land from Powell with notice of the covenant; in 1880, the company demanded a conveyance, and, upon Gomm's refusal, brought a bill for specific performance. Kay, J., who heard the case in the first instance, refused to accept the doctrine laid down in *Gilbertson* v. *Richards*[3] and *Birmingham Canal Co.* v. *Cartwright*[4] and observed: "In my opinion, a present right to an interest in property which may arise at a period beyond the legal limit is void, notwithstanding that the person entitled to it, may release it." The learned Judge, however, went on to hold that the covenant in this case did not run with the land, that a purchaser without notice would not be bound by it, and, as a contract which does not create any estate or interest in property, at law or equity, is not obnoxious

London & S. W. R. Co. v. *Gomm.*

[1] "I think that wherever a right or interest is presently vested in *A* and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the Rule against Perpetuities, such right or interest is not obnoxious to that rule, and for this reason; the rule is aimed at preventing the suspension of the power of dealing with property, the alienation of land or other property. But when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that *Gilbertson* v. *Richards* is a distinct authority in favour of that conclusion," 11 Ch. D.

[2] (1882) 20 Ch. Div., 562, p. 133, *ante*.

[3] 4 H. & N., 277.

[4] 11 Ch. D., 421.

to the Rule against Perpetuities, which is a branch not of the law of contract but of property, the covenant was not within the mischief of the rule and could consequently be specifically enforced. Upon appeal preferred by the purchaser against whom specific performance was decreed, the Court of Appeal[1] held that the option to purchase gave an equitable interest in the property to which the Rule against Perpetuities was applicable, and that judged by that rule, it was void; Sir George Jessel added that Mr. Justice Kay was "quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the *Birmingham Canal Co.* v. *Cartwright*, which must be treated as over-ruled."[2]

Sir George Jessel.

Avern v. *Lloyd.*

Before I conclude this part of the subject, I ought to invite your attention to another recent case[3] in which an interest subject to a remote condition was held good because it was alienable. In that case, there was a bequest of personal property to *A* for life, and after *A's* death to his issue for life, and to the executors, administrators and assigns of the survivor. Stuart, V. C., held that this gave an absolute interest to the survivor, but went on to add observations based on the doctrine that an alienable interest cannot be too remote.[4] This decision, however, has been over-ruled by the Court of Appeal in *Re Hargreaves*.[5]

An examination of the cases we have considered above shows that the Rule against Perpetuities is some-

[1] Sir George Jessel, M. R., Sir James Hannen, and Lord Justice Lindley.

[2] 20 Ch. D.

[3] *Avern* v. *Lloyd* (1868), L. R., 5 Eq., 383.

[4] "Each of the tenants for life in this case had as much right to alien his contingent right to the absolute interest as to alien his life estate; and the person claiming under an assignment of the whole estate and interest of the tenant for life would, as soon as his assignor became the survivor of the other tenants for life, be entitled to the possession and enjoyment as absolute owner. It seems obvious that such a case is not within the principle on which the law against perpetuity rests, and that the limitation in question of the absolute interest does not fail as being too remote." L. R., 5 Eq., 388. *See* also a dictum to the same effect in *Gooch* v. *Gooch* (1853), 3 DeG. M. & G., 366 (383).

[5] (1889) 43 Ch. Div., 401.

thing more than another version of the rule which regulates the imposition of restraints upon the alienation of property, and that interests, although alienable, may yet be bad for remoteness. The mere fact that a contingent interest may be released by persons in being, and that a good title may thus be made, is not enough to take the case out of the rule, if the estate cannot be alienated by those having vested interests in it, because a possible future interest is created which may not vest within the time fixed by the rule. Undoubtedly the fact that the holders of vested interests cannot convey, tends to make the property inalienable, for very often the holders of contingent interests are unknown or cannot be found; and, even if they are accessible, it is not easy to obtain releases of contingent rights[1] on which it is impossible to fix a value; but the possibility of obtaining releases is not the test by which we are to determine the validity or invalidity of a limitation. In short, the rule is intended to subserve the public policy of fixing a limit beyond which a person's power of disposal over his property shall cease, public policy which intends that beyond a certain time, property shall not be tied up, but shall pass free and unfettered to an owner who can employ it just as he chooses, untrammelled by the directions of another who might have possessed it in the remote past.[2]

Relation between remoteness and restraint on alienation.

[1] If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner is greatly diminished, while the executory gift can sell for very little, so that the sum of the value of the interest of the present owner and the value of the executory gift would be much less than the value of the property if it were unfettered.

[2] If land be given to *A* and his heirs, with an option of purchase at any time by *B* and his heirs, upon the principles discussed above, the gift to *B* would be too remote and therefore bad. A similar question may arise, if land be given to *A* charity until some contingency, which may be remote, happens, and then to *B* charity; is the gift to *B* charity good? If the test of invalidity applied to the first case, namely, the remoteness or nearness of the contingency on which the gift is to take effect, be also applied to the second case, the answer would be that the gift to *B* charity is bad for remoteness. If, on the other hand, the true test had been the restraint or non-restraint of an interest which is legally alienable, the answer would have been

Inalienable rights.

We shall now turn our attention to an examination of the rules which regulate the imposition of restraints upon the right of alienation of property; but before we do so it is necessary to invite your attention to the well known fact that some rights are in their nature inalienable, while there are other rights the nature of which presents no obstacle to alienation. To take one illustration, every one of us has a right not to be assaulted, not to be defamed or not to be maliciously prosecuted. These rights are clearly inalienable. The infringement of each of these rights gives rise to a right to recover damages for assault, defamation or malicious prosecution as the case may be. This secondary right is not by nature inalienable, and we can without difficulty conceive of it as transferable. Again every person has not only a right not to be slandered but he may have the right that his wife should not be slandered; in other words, if the wife is slandered, it may not only entitle her to recover damages, but may also entitle the husband to the benefit of a similar remedy. It would be a mistake, however, to suppose that the right which the husband possesses has been transferred to him from the wife; each of them has an independent right, although such right arises in different persons by a single act, namely, the slander of the wife. We have nothing to do here with rights which are by nature inalienable; nor do we propose to deal with rights which though alienable by nature have been made inalienable by law, for instance, the law forbids the transfer of a right to recover damages for a libel. Similarly we shall exclude from our consideration cases in which a statute forbids the transfer of a particular property, as for instance the estate settled by Parliament on the Duke of Wellington.[1]

Illustrations.

Rights inalienable by law or statute.

that the gift to *B* charity is good, as the gift to *A* charity has made the property inalienable, and has thus placed it beyond the operation of the Rule against Perpetuities. *See*, in this connection, *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G., 460; which has been examined fully in Lecture X, p. 235, *ante*, and *Re Tyler* (1891), 3 Ch., 252.

[1] (1814) 54 Geo. III, C. 161, § 28.

The field of our enquiry is therefore narrowed down to the consideration of the cases in which restraints have been imposed on the alienation of rights which are by nature assignable, when such restraints are imposed not by public policy, but by the will of persons who have created or transferred such rights. The question in all such cases is, how far can such restraints be lawfully imposed, or, in other words, how far is it against public policy to allow restraints to be put upon transfers which public policy does not forbid. You will further find that restraints on alienation are sought to be effected in one of two ways: *first*, the estate which is created or conferred may simply be declared inalienable; if this restraint is imposed under circumstances recognised by law, the person who takes the estate cannot assign it, he cannot rid himself of it, the estate remains with him, and any attempt at alienation is inoperative: *second*, the estate may not be expressly declared to be inalienable, but it is given either on condition that it shall not be alienated, or on condition that it shall be forfeited upon alienation; the owner of the estate in such a case may assign it as he pleases, he cannot be compelled to keep it against his will subject to the qualification that if the restraint is valid in law the estate is forfeited upon assignment. We shall take up each of these classes of cases separately and examine and illustrate the principles applicable to them.

Restraint on alienation effected in two ways.

As to the first class of cases which relate to restraints upon alienation, pure and simple, it may be laid down generally[1] that under the English law, any provision

First class. Alienation of absolute interest.

[1] I do not purpose to consider here at any length the cases in which married women may be restrained from the voluntary or involuntary alienation of their separate estates. It will be remembered that when, in the case of married women, the doctrines of separate use and restraint upon anticipation came into existence, the interests of which the alienation was sought to be restrained were life interests; the question as to the validity of a clause against anticipation upon a gift of an absolute interest, appears to have first arisen in *Baggett* v. *Meux* (1844), 1 Coll., 138, in which the decision of Knight Bruce, V.C., was affirmed by Lyndhurst, L.C. (1 Phil., 627), and it was held that a restraint on anticipation by a

restraining the alienation, voluntary or involuntary, of an estate in fee-simple or an absolute interest in chattels, real or personal, whether legal or equitable, is void. It would be by no means difficult to support this proposition by a long array of cases to be found in the books; it would be more instructive, however, to lay before you such of them only as furnish an illustration of the principle in its various applications. Thus in the case of *Piercy* v. *Roberts*,[1] there was a bequest to executors of a fund upon trust to apply the principal and interest for the sole use and benefit of the testator's son in such manner and at such time as the executors might think best, with a proviso that if the son should happen to die before the whole of the fund was exhausted, the unapplied part should sink into the residue. The son became bankrupt and his assignees claimed the fund. Sir John Leach, M.R., held that their claim was well founded, for obviously when a fund is given to a person absolutely a condition cannot be annexed

Piercy v. *Roberts.*

married woman was valid as well upon a fee simple as upon a life estate. *See* also *Re Currey* (1886), 32 Ch. D., 361; *Stogdon* v. *Lee* (1891), 1 Q. B., 661; *Cf.* 44 & 45 Vict. (1881), C. 41, § 39, and 56 & 57 Vict. (1893), C. 63, § 2. It would be an interesting question, which does not appear to have yet been determined, whether a restraint imposed upon the alienation of an estate in fee simple prevents any dealing at all with the estate by a married woman during her coverture, or, whether it allows her to transfer the whole estate subject to her right to receive the income during her life; see *Spring* v. *Pride* (1864), 10 Jur. N. S., 646; *Heath* v. *Wickham*, 3 L. R., Ir., 376; 5 L. R., Ir., 285 (295). It is somewhat difficult to reconcile all the cases on the subject, but the result of the authorities may be fairly summarised in two propositions: I. When the intention was clear that the property shall continue in the hands of trustees, and there is a clause against anticipation, a married woman would not be entitled to have the property transferred to her even though her interest be absolute; *Re Benton* (1882), 19 Ch. D., 277; *Re Bown* (1883), 27 Ch. D., 411; *Re Spencer* (1885), 30 Ch. D., 183; *Re Grey's Settlements* (1886-87), 34 Ch. D., 85, 712; *Tippett's and Newbould's Contract* (1888), 37 Ch. D., 444: II. When there is a direction to pay monies in the hands of a married woman after an intervening interest with a proviso that her receipt alone shall be a sufficient discharge, the clause against anticipation will be treated as intended to restrain anticipation only during the continuance of the intervening interest. *Re Sykes's Trusts* (1862), 2 J. & H., 415; *Re Croughton's Trusts* (1878), 8 Ch. D., 460; *Re Bown* (1883), 27 Ch. D., 411.

[1] (1832) 1 My. & K., 4.

to the gift that so much as he shall not dispose of, shall go over to another person.[1] Again in *Gosling* v. *Gosling*[2] there was a direction that no devisee should be put into possession of the testator's estate or enjoy the rents or profits of any property left by him until he attained the age of twenty-five, the rents and profits meanwhile to accumulate. Sir W. P. Wood, V.C., held that the direction was inoperative and observed: "The principle of this Court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment in full, so soon as they attain twenty-one. And upon that principle, unless there is in the will or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them, until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of

Gosling v. *Gosling.*

[1] The policy of this rule has been variously stated; one reason which has been assigned is that in many cases, it might be very difficult and even impossible to ascertain whether any part of the fund remained undisposed of or not. Another reason which has been assigned is "that it would be contrary to the well-being of the party absolutely entitled to lead him profusely, to spend all that was given him which in many cases might be all that he had in the world." *Per* Truro, L. C., *Watkins* v. *Williams* (1851), 3 Mac. & G., 622 (629). *See* also *In re Coe's Trust* (1858), 4 K. & J., 199. Cf. *In re Landon's Trusts* (1871), 40 L. J. Ch., 370, whereupon a claim preferred by the assignees of a beneficiary of a fund (who had become bankrupt), it was held by Lord Romilly, M.R., that the trustees were entitled to retain the fund because the trustees had a discretion to give the income away from the beneficiary who was not absolutely entitled to it.

[2] (1862) Johnson, 265.

their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy, the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."[1]

Coventry v. Coventry.

In *Coventry* v. *Coventry*,[2] there was a devise of land on trust to accumulate the income until 1875 and a direction that the accumulation should then form a part of the residuary estate which was devised to several persons. The testator died in 1863, and it was held that the residuary legatees were entitled to their shares at once, in spite of the accumulation clause. In another case,[3] a residue was bequeathed to the testator's four sons equally, the capital not to be divided until they were all settled in life; the interest of their shares alone to be paid after they were all provided for, until they severally became thirty years old, when the capital was to be placed at their disposal. Under these circumstances the Master of the Rolls held that each son was entitled to his share of the capital as soon as he attained the age of twenty-one.[4] Similarly, in a later case,[5] where property was devised to a daughter, "to be settled on her at marriage," but the daughter reached twenty-one and was unmarried, it was held that she was entitled to the property.[6] It is hardly necessary to point out that the

[1] Johnson, 272.

[2] (1865) 2 Dr. & Sm., 470.

[3] (1861) *Re Jacob's Will*, 29 Beav., 402.

[4] *See* also *Pearson* v. *Dolman* (1866), L. R., 3 Eq., 315.

[5] *Magrath* v. *Morehead* (1871), L. R., 12 Eq., 491. *See* also *Powell* v. *Boggis* (1866), 35 L. J. Ch., 472, which shows that a testator may not give an absolute interest, either in realty or in personalty, with a proviso restraining alienation, even though the interest should be reversionary, and the prohibition should only apply to alienation before the vesting in possession.

[6] *See* also *Snow* v. *Poulden* (1836), 1 Keen, 186; *Hilton* v. *Hilton* (1872), L. R., 14 Eq., 468 (475); *Talbot* v. *Jevers* (1875), L. R., 20 Eq., 255; *Gott* v. *Nairne* (1876), 3 Ch. D., 278; *Weatherall* v. *Thornburgh* (1878), 8 Ch. Div., 261; *Re Cameron* (1884), 26 Ch. Div., 19; *Re Fitzgerald's Settlement* (1887), 37 Ch. Div., 18. In *Havelock* v. *Havelock* (1880), 17 Ch. D., 807, Malins, V.C., allowed accumulations to be broken into, in order to furnish maintenance to infants who were only contingently entitled, and this was followed in

principle[1] we have been illustrating, namely, the invalidity of provisions which postpone the payment of the principal of a fund in which a devisee has an immediate absolute interest, is supported by another class of cases[2] with which you are familiar, I mean the class of cases in which it has been held that such postponement beyond the limit fixed by the Rule against Perpetuities, does not deprive the devisee of his right to have the principal paid to him, if he has an absolute interest in the fund within the required time. These cases show that the devisee is considered as acquiring, within the required limits, all the rights to the property, and the postponement of the right to the payment of the principal is considered void, because if the postponement to the right of the principal be valid, that right could never be enjoyed by the devisee inasmuch as it would be clearly bad for remoteness.

Postponement of payment of principal.

Re Collins (1886), 32 Ch. D., 229; but in the similar case of *Re Alford* (1886), 32 Ch. D., 383, maintenance was not allowed. The case of *Havelock* v. *Havelock* was not followed in a recent case in Ireland (*Kemmis* v. *Kemmis*, 13 L. R. Ir., 372; confirmed on appeal 15 L. R. Ir., 90) and does not appear to be defensible on principle. Cf. *Re Colgan* (1881), 19 Ch. D., 305.

[1] Besides the cases discussed in the text, reference may be made to *Hood* v. *Oglander* (1865), 34 Beav., 513; *Attwater* v. *Attwater* (1853), 18 Beav., 330, where a prohibition not to sell out of the family was held invalid; *Renaud* v. *Tourangeau* (1867), L. R., 2 P. C., 4 (18), where a prohibition not to sell for twenty years, land devised in fee simple was held invalid. *Sadler* v. *Pratt* (1833), 5 Sim., 632; *Josselyn* v. *Josselyn* (1837), 9 Sim., 63; *Jackson* v. *Marjoribanks* (1841), 12 Sim., 93; *Saunders* v. *Vautier* (1841), 4 Beav., 115; *Curtis* v. *Lukin* (1842), 5 Beav., 147 (155); *Rocke* v. *Rocke* (1845), 9 Beav., 66; *Swaffield* v. *Orton* (1847), 1 DeG. & Sm., 326; *Re Young's Settlement* (1853), 18 Beav., 199. *See* also *Peard* v. *Kekewich* (1852), 15 Beav., 156, which does not appear to be consistent with the other cases, and it does not seem possible to support the decision on principle.

[2] See *Murray* v. *Addenbrook* (1830), 4 Russ., 407; *Bland* v. *Williams* (1834), 3 Myl. & K., 411; *Greet* v. *Greet* (1842), 5 Beav., 123; *Harrison* v. *Grimwood* (1849), 12 Beav., 192; *Tatham* v. *Vernon* (1861), 29 Beav., 604; *Saumarez* v. *Saumarez* (1865), 34 Beav., 432; *Re Edmondson's* estate (1868), L. R., 5 Eq., 389; *Fox* v. *Fox* (1875), L. R., 19 Eq., 286; *Oddie* v. *Brown* (1859), 4 DeG. & J., 179; *Re Bevan's Trusts* (1887), 34 Ch. D., 716. *See* also *Kevern* v. *Williams* (1832), 5 Sim., 171.

Alienation of estates for life.

We shall now proceed to consider under what circumstances, if any, valid restraints may be imposed upon the alienation of estates for life, and here it may be stated generally that under the English law, any provision restraining the alienation, voluntary or involuntary, of a life estate in realty or personalty, whether legal or equitable, is void. The most important class of cases in which the question has arisen, has been those in which attempt is made to confer upon a person the benefits of property without its consequent liabilities. It is not perhaps unnatural that a man who possesses property should desire that it should be kept in his family and be enjoyed by his descendants, but that it should be placed beyond the reach of their creditors. It is equally natural that judges should set their faces against devises which are the manifestations of such a desire. The matter will be best illustrated by an examination of some of the leading cases on the subject which may be divided roughly into six classes.

Six typical cases.

Case I. *Brandon* v. *Robinson*.

In *Brandon* v. *Robinson*,[1] a testator directed money to be invested in public funds in the names of trustees, and the income, as the same became payable, paid from time to time to *A*, with a proviso that the same should not be assignable, with a gift over on the death of *A*. Upon the bankruptcy of *A*, it was held that the assignees were entitled to his life-interest. This is consistent with the principle that if the income of trust property is to be paid to *A* during his life, a direction that it should be paid into his own hands or that he shall not alienate or anticipate it or that it shall not be liable for his debts, is void.[2]

[1] (1811), 18 Ves., 429. *See* also *Bradley* v. *Peixoto* (1797), 3 Ves., 324, 4 R. R., 7, where it was held that upon a bequest to *A* for life, and at his decease, to his heirs and executors, with a gift over if he attempts to dispose of the principal, *A* takes an absolute interest and the condition which was inconsistent with the gift was void.

[2] See *Barton* v. *Briscoe* (1822), Jac. 603; *Graves* v. *Dolphin* (1826), 1 Sim., 66; *Woodmeston* v. *Walker* (1831), 2 Russ. & M., 197; *Jones* v. *Salter* (1831), 2 Russ. & M., 208; *Brown* v. *Pocock* (1831), 2 Russ. & M., 210.

Case II. *Green* v. *Spicer*.

Again in *Green* v. *Spicer*,[1] there was a devise to trustees on trust to apply the rents and profits for the benefit of *A* during his life at such times and in such manner as they should think proper, with a proviso that *A* was not to have any power of sale, mortgage or anticipation. *A* took the benefit of the Insolvent Act, and his assignees were held by Sir John Leach, M.R., to be entitled to the rents and profits. This you will see, is obviously based on the principle that if trustees are directed to apply the income of a trust fund for the support and benefit of *A* at such times and in such manner as they may deem fit, but have no authority to apply in any other way, his assignee is entitled to demand the income from the trustees.[2]

Case III. *Rippon* v. *Norton*.

In *Rippon* v. *Norton*,[3] property was given by deed to trustees in trust for *A* during his life, till his insolvency, to apply the income in such manner and to such persons for the board, lodging and subsistence of *A* and his family as the trustees should think proper, and there was a gift over on the death of *A*. *A* took the benefit of the Insolvent Act at a time when his wife was dead, but he had three children. The children admitted that the assignee in bankruptcy was entitled to a fourth share of the income and claimed the other three-fourths. Their claim was decreed, apparently on the principle that if trustees are directed to apply the income of a trust fund for the support or benefit of *A* and other purposes, but they have no right to exclude *A*, the assignee of *A* can claim from the trustees the amount which he could

[1] (1830) Tamlyn, 396; 1 Russ. & M., 395.

[2] *See* also *Snowdon* v. *Dales* (1834), 6 Sim., 524; *Younghusband* v. *Gisborne* (1844), 1 Coll., 400, where, though the trust was for the personal support and maintenance of *A*, and there was an express provision that the annuity was not liable to the claims of his creditors, it was held by Knight Bruce, V.C., that upon the insolvency of *A*, his assignees were entitled. *See*, however, *Re Bullock* (1891), 60 L. J. Ch., 341. The case of *Two-peny* v. *Peyton* (1840), 10 Sim., 487, may perhaps be supported on the ground that the whole income of the fund was not payable to the beneficiary and therefore could not be rightfully claimed by his assignee in bankruptcy.

[3] (1839) 2 Beav., 63.

have lawfully claimed, should he have applied, for his benefit.[1]

Case IV. *Lord* v. *Bunn.* The type of another class of cases may be taken to be *Lord* v. *Bunn*[2] where property was given by deed to trustees in trust to apply the income towards the support of *A* and his wife and children or any of them or for his, her, their or any of their use and benefit at the absolute discretion of the trustees, with a gift over upon the death of *A*. *A* married, had several children and took the benefit of the Insolvent Act. Knight Bruce, V.C., held that the trustees had a right to apply the rents among the insolvent, his wife and children or any of them to the exclusion of the others, and consequently nothing more passed to the assignee than the interest which the insolvent had.[3] This is founded on the principle that if trustees are directed to apply the income of a trust fund for the support or benefit of *A* or for other purposes at their discretion, and, they in fact apply the whole of the income for other purposes, the assignee of *A* has no valid claim against the trustees.

Case V. *In re Coleman.* The type of another class of cases closely analogous to those just considered is furnished by the case of *In re Coleman*[4] to which I have already referred. These cases lay down the doctrine that if trustees are directed to pay the income of a trust fund to *A* or to apply it for his support or benefit or for other purposes at their discretion, although they are not bound to pay anything to *A* and

[1] *See* also *Page* v. *Way* (1840), 3 Beav., 20; *Kearsley* v. *Woodcock* (1843), 3 Hare, 185; *Wallace* v. *Anderson* (1853), 16 Beav., 533; *Godden* v. *Crowhurst* (1842), 10 Sim., 642, is apparently the other way, but *see* the observations in *Younghusband* v. *Gisborne* (1844), 1 Coll., 400. *See* also *In re Coleman* (1888), 39 Ch. Div., 443.

[2] (1843) 2 Y. & C. C. C., 98.

[3] *See* also *Holmes* v. *Penney* (1856), 3 K. & J., 90, where in a similar case, Wood, V. C., held that he could not decide what proportion of the income *A's* wife and children should take so as to leave the rest of the income available for *A's* creditors. It is remarkable that in this case the trust was by the settlor *A* for his own benefit and the benefit of his wife and children.

[4] (1888) 39 Ch. Div., 443. *See* also *Lord* v. *Bunn* (1843), 2 Y. & C. C. C., 98; *Re Neil* (1890), 62 L. T. N. S., 649.

consequently his assignee has no claim against them, yet if after notice of the assignment they make any payments to *A*, they must account to the assignee for all such sums.

Case VI. Lastly, a question of some nicety may arise when trustees are directed to apply the income of a trust fund for the support or benefit of *A* or for other purposes at their discretion ; if in such a case *A* takes the benefit of the Insolvent Act, are the trustees liable to account to the assignee of *A* for any sums not actually paid over to him but spent for his benefit or support with full knowledge of the assignment. I have just explained to you that the assignee can demand from the trustees, the money which they are bound to spend for the benefit or support of *A*, and in a case in which it is discretionary for them to apply the proceeds of a fund for the benefit of *A*, although the assignee cannot compel them to do so, he is yet entitled to hold the trustees responsible for any payments actually made to *A*, after notice of the assignment. It would seem to follow, therefore, that if the assignee of *A* can demand from the trustees the money which they have actually paid to *A*, he is equally entitled to call upon the trustees to account to him for money which they have spent for the support or benefit of *A*. There is authority, however, in support of the opposite view. In the case of *Re Coleman*,[1] Cotton, L. J., said : "Does the assignment include every benefit which the trustees can give to Coleman out of the income? I think, not ; if the trustees were to pay an hotel-keeper to give him a dinner, he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money to him or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment." The learned Judge then went on to distinguish *Green* v. *Spicer*[2] and *Younghusband* v.

In re Coleman examined and discussed.

[1] (1888) 39 Ch. Div., 443. *See* also *Re Bullock* (1891), 60 L. J., Ch. 341, and *Godden* v. *Crowhurst* (1842) 10 Sim., 642.

[2] (1830) Tamlyn, 396.

Gisborne[1] on the ground that in those cases, the income was directed to be applied solely for the benefit of the insolvent, which made it his property. I confess, however, that it is not easy to reconcile this decision with the principles discussed above. It is unquestionable that the benefits which the trustees can confer upon the insolvent may be personal and inalienable, and, consequently, there may be rights which do not pass to an assignee in bankruptcy ; for instance, a man may be a member of a club and as such entitled to eat a dinner at the club-house on stated days without paying for it ; this right clearly does not, upon his bankruptcy, pass to his assignee. A trust fund, however, does not produce dinners, though it produces money with which dinners can be bought but which can also be assigned. According to the view taken by the Court of Appeal, if the trustees buy a loaf of bread or a bottle of wine and give it to the beneficiary to eat or drink, they are bound to account for the money so spent to the assignee in bankruptcy ; if, on the other hand, they direct the beneficiary to enter a hotel and help himself, they are not liable to account for what they pay to the hotel-keeper. This distinction is so fine that it would be better to adhere to the rule that the trustees must account to the assignee for all sums paid to the beneficiary or spent for his benefit and support.

Alienation of life interests.

To summarise the principles which regulate the power of alienation of life interests and their liability for debts, it may be stated generally that all rights to enjoy property or to have its income paid or expended or applied for one's benefit during life, are alienable. If the right to the whole or any part of the income of a trust fund is exclusive, any provisions against anticipation or as to the times or amounts of payment or the mode of expenditure or application are inoperative against an assignee or creditor. If the right is not exclusive, and the trustees have a discretion,

[1] (1844) 1 Coll., 400.

they cannot be compelled to apply the funds for the benefit of assignees or creditors ; but if after notice of the assignment, whether voluntary or involuntary, they pay the proceeds of the fund to the beneficiary or apply them for his benefit, they are liable to account to the assignee. Although, however, a restraint cannot be imposed on the alienation of a life interest or its liability to satisfy debts, restricted for the benefit of the person entitled to the life interest, such a restriction can be imposed for the benefit of third persons. For instance, if a person acquires by purchase the right to be a life member of a club, the club cannot be compelled to admit his assignee. The reason upon which these principles are based, is obvious enough ; it is against public policy that a man should have an estate to live on but not an estate to pay his debts with, in other words, that he should have the benefit of his wealth without its responsibilities. It is not the function of the law to join in the futile effort, to save the foolish and the vicious from the inevitable consequences of their own vice and folly. Property tied up for a century contributes nothing to the general wealth, while it encourages the vice and idleness of those who never earned it but enjoy its fruits.

Principles summarised.

We have now discussed the first class of cases, in which an estate is declared inalienable ; we shall next proceed to the consideration of the second class of cases in which an estate is granted upon condition, for breach of which it is liable to forfeiture. The alienation, against which the threat of forfeiture is made, may belong to one of four classes : *first*, it may be alienation generally, that is, to any one, at any time, under any circumstances ; *secondly*, it may be alienation to certain specified persons ; *thirdly*, it may be alienation within a certain limited time ; *fourthly*, it may be alienation in a certain prescribed manner. In addition to the questions which arise in relation to these four classes, we shall have to examine the further question, whether an estate in fee simple can be forfeited for failure to alienate it.

Second class. Forfeiture.

Four typical cases.

Case I. *Re Machu.*

As regards the first class, it may be laid down that, under the English law, an unqualified condition or conditional limitation on alienation, either in general or in any particular mode, cannot be joined to a fee simple or to an absolute interest in personalty. It is hardly necessary to examine the earlier authorities upon this fundamental proposition which is in accordance with public policy and the correctness of which is beyond dispute. But I may usefully refer you to one of the recent authorities in illustration of the proposition. In *Re Machu*,[1] *A* devised land to his daughter *E* and her heirs, subject to the proviso, that if *E* should be declared a bankrupt or liquidate with her creditors or avail herself of any Act for the relief of insolvent debtors, the devise to her should be void and the premises devised to her should go to her children ; it was held that the proviso was void.

Case II. *Attwater* v. *Attwater.*

As regards the second class of cases, under the English law, a condition or conditional limitation on alienation to certain specified persons, can probably be attached to a fee-simple or to an absolute interest in personalty, but how far a condition or conditional limitation on alienation, except to certain specified persons, can be so attached, is doubtful. In *Attwater* v. *Attwater*,[2] there was a devise of land to the nephew of the testator with an injunction never to sell it out of the family, "but if sold at all, it must be to one of his brothers hereafter named" of whom there were five ; Lord Romilly, M. R., held that the condition was invalid, as it was repugnant to the quality of the estate given, and observed : "It is obvious, that if the introduction of one person's name as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created as complete and perfect as if no person whatever was named, inasmuch as the name of a person who alone is permitted to purchase, might be so selected as to render

[1] (1882) 21 Ch. D., 838; *see* also *Re Dugdale* (1888), 38 Ch. D., 176; *Metcalfe* v. *Metcalfe* (1889), 43 Ch. D., 633; *Corbett* v. *Corbett* (1888), 13 P. D., 136; 14 P. D., 7.

[2] (1853) 18 Beav., 330.

it reasonably certain, that he would not buy the property and that the property could not be alienated at all."[1] In a later case,[2] however, the same question came before Sir George Jessel, M.R., and that learned judge held in an elaborate opinion, that a devise of land to the brother of the testator, on the condition that he never sells it out of the family, was perfectly valid. After referring to the passage from Littleton which I have already quoted[3] in another connection, Sir George Jessel pointed out that the true test is, whether the condition takes away the whole power of alienation substantially, and observed: "You may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all these ways, you may limit it, and it appears to me that, in two ways, at all events, this condition is limited. First it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease or he may mortgage or he may settle; therefore, it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large and was certainly not small. Then it is not, strictly speaking, limited as

In re Macleay.

Sir George Jessel.

[1] Lord Romilly relied upon the rules laid down by Lord Coke (Co. Litt., 223*a*) and declined to follow *Doe* v. *Pearson* (1805), 6 East., 173, where Lord Ellenborough had arrived at a contrary conclusion upon the authority of *Anon* (1561). Dalison 58, pl., 5; and *Daniel* v. *Uply* (1662), Latch 9, 39, 134. *See* also *Ludlow* v. *Bunbury* (1865), 35 Beav., 36, where a forfeiture clause under similar circumstances was held to be void by Lord Romilly.

[2] (1875) *In re Macleay*, L. R., 20 Eq., 186.

[3] Co. Lit., 223 *a*, *b*. *See* p. 243, *ante*.

to time, except in this way, that it is limited to the life of the first tenant in tail (fee-simple ?); of course, if unlimited as to time, it would be void for remoteness under another rule ; so that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled or is not good law, this is a good condition."[1] You will see, therefore, that the authorities upon this point are in hopeless conflict, and the only rule, which may be suggested for acceptance, is, that a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes, but is bad if it allows of alienation only to selected individuals or classes. It must be admitted, however, that the rule, so enunciated, may be difficult of application and may, perhaps, be also successfully evaded. In reality the choice lies between the two alternative tests, *first*, that a condition against alienation is bad, if alienation is restricted to particular individuals or a particular class, and *second*, that a condition is bad, only when all alienation is substantially restricted ; the former test is, according to Lord Romilly, supported by the high authority of Lord Coke, while the latter test is supported by the weighty authority of Lord Ellenborough and Sir George Jessel.[2]

Two alternative tests.

[1] In *Rosher* v. *Rosher* (1884), 26 Ch. D., 801(814), Pearson, J., doubted the correctness of the decision of Sir George Jessel quoted above and observed : "Lord Coke must be read with a certain amount of caution, and if any one will take the trouble to read two or three passages in Sheppard's Touchstone, he will find that the learned professors of the law are perpetually at loggerheads as to what is a good condition, and the reason is that they have departed from the first principle that a condition which is repugnant to a gift, is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say, by any rule, what exceptions are good and what are bad ;" *see* also *Dugdale* v. *Dugdale* (1888), 38 Ch. D., 176 (179).

[2] In *Ludlow* v. *Bunbery* (1865), 35 Beav., 36, Lord Romilly apparently held, that a condition against alienation by a devisee to *X* or his descendants was void ; if qualified conditions are to be allowed at all, this would seem difficult to support on any theory. *See* also 4 Kent's Commentaries, p. 131, where it is said : " If a restraint upon alienation be confined to an individual named, to whom the grant is not to be made, it is said by very high authority (Lit. § 361, Co. Lit., 223) to be a

Case III. As regards the third class of cases, in which restraints on alienation, qualified as to time, are attempted to be imposed, we have to distinguish between a condition against alienation while the interest is contingent and a condition against alienation while the interest is vested. Under the English Law it may be laid down broadly, that a condition or conditional limitation upon alienation of a contingent interest, before it vests is good. This is clearly right in principle, for a vested estate cannot be made terminable by an illegal condition; but if a testator declares that an estate shall not vest if a certain thing is done, the estate will never vest if the thing is done; if it is not done, the vesting may depend upon whether the omission to do the thing was legal or illegal, but, if it is done, the estate will not vest in any case.[1] On the other hand, if a fee-simple or an absolute interest in personalty was vested, under the English Law, a condition or conditional limitation against alienation attached to it, is void, however restricted in time. The leading authority, in support of this proposition, is the decision of Mr. Justice Pearson in the recent case of *Re Rosher*,[2] where it was held that a condition in absolute restraint of alienation, annexed to a devise in fee, even though its operation is limited to a particular time, for example, to the life of another living person, is void in

Re Rosher.

valid condition. But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day."

[1] See *Large's Case* (1587), 2 Leon, 82; 3 Leon, 182. In this case, there was a devise to the testator's widow, until his son *A* should reach the age of twenty-two, and then to others of his sons upon condition that if any one of such sons should sell any lands before *A* reached twenty-two, he should forever lose the same; the event contemplated happened and the son who had sold, was held to have forfeited his estate. Observe that the widow took a freehold, for *A* might die before he reached twenty-two and then she would hold for her life; the sons took a remainder, supported by the widow's life estate, but contingent upon *A's* reaching twenty-two. *See* also *Churchill* v. *Marks* (1844), 1 Coll., 441; *Burnett* v. *Blake* (1862), 2 Dr. & Sm., 117; *Graham* v. *Lee* (1857), 23 Beav., 388; *Re Payne* (1858), 25 Beav., 556; *Powell* v. *Boggis* (1866), 35 Beav., 535; *Samuel* v. *Samuel* (1879), 12 Ch. D., 152.

[2] (1884) 26 Ch. D., 801.

Re Porter.

law, as such a condition is repugnant to the nature of an estate in fee.[1] In a later case,[2] however, Mr. Justice North questioned, if there was any distinction in principle, so far as the present question is concerned, between a contingent interest and an interest which is vested but is liable to be divested; but I may point out that a provision for forfeiture attached to a contingent estate is a condition precedent, while, when attached to an estate vested, although liable to be divested, it is a condition subsequent; and consequently the distinction between the two cases is essentially the fundamental distinction between conditions precedent and conditions subsequent.

Case IV. *Ware* v. *Cann.*

We shall lastly consider the fourth class which treats of restraints on alienation qualified as to manner. Here it may be broadly laid down that a condition or conditional

[1] *See* also the earlier cases on the subject, *Ware* v. *Cann* (1830), 10 B. & C., 433; *Bradley* v. *Peixoto* (1797), 3 Ves., 324; *Willis* v. *Hiscox* (1838), 4 Myl.& Cr., 197; *Rishton* v. *Cobb* (1839), 5 Myl. & Cr., 145; *Re Machu* (1882), 21 Ch. D., 838; *see* also *Renaud* v. *Tourangeau* (1867), L. R., 2 P. C., 4 (18), where the Judicial Committee held that a restraint upon the devisees of lands, from alienating them for a period of twenty years from the testator's death, was not valid, either by the old law of France or by the general principles of jurisprudence. *See* also *Dugdale* v. *Dugdale* (1888), 38 Ch. D., 176, where Kay, J., pointed out that an incident of the estate given which cannot be directly taken away or prevented by the donor, cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person; cf. *In re Parry and Daggs* (1885), 31 Ch. D., 130, where Fry, L. J., observed: "The testator's son is devisee in fee, and on his death either one of his issue will be his heir or some one else. If his heir be his issue, such issue will take under the original devise, and the gift over does not arise; if his heir be some one not his issue, such heir would take equally under the original devise and under the gift over; so that the operation of the gift over, if it be valid, is not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son. That was an illegal devise, and consequently the gift over is void."

[2] *Re Porter* (1892), 3 Ch., 481. The facts of this case show that the interests vested in the sister's children became indefeasible when they reached twenty-one, so that the question substantially before the Court was the effect of a provision for forfeiture attached to an interest indefeasibly vested, though not yet reduced to possession; such a provision is clearly bad.

limitation, aimed against a particular mode of alienation, is as bad, as if directed against alienation generally. Thus for instance, in *Ware* v. *Cann*,[1] it was held, that a gift over, upon the tenant in fee mortgaging, levying a fine, or suffering a recovery, was bad in law, inasmuch as the condition imposed was repugnant to the interest created. Similarly, a gift over, on the charging of the fee with an annuity, is bad in law, inasmuch as this is an attempt on the part of the testator to protect an estate in fee from the liability to debts and contracts of the owner.[2] In the same manner in the case of a devise in fee, with a direction that the devisee should not alienate the estate, except by way of exchange or re-investment, the restriction is void; if a testator is desirous of imposing such a restriction he must do it in a different form, giving a limited estate, as for life; but if he gives an absolute estate in fee-simple and annexes such a condition to it, the condition is altogether repugnant to the gift of the estate and wholly inoperative.[3] You will remember, however, that there are some observations, made by Sir George Jessel, M.R., in *Re Macleay*[4] which I have already placed before you and which tend to support the opposite view; but, as pointed out by Pearson, J., in his vigorous dissent from the view accepted by the Master of the Rolls,[5] such a condition, if allowed to exist, may be easily evaded, and consequently the adoption of the view which found favour with Sir George Jessel, is of very doubtful expediency.

Gifts over upon intestacy.

Again, as a testamentary disposition is one of the modes of alienating property, a condition, that a fee simple shall go over, unless the grantee disposes of it in his lifetime, is void; for such a provision limits the mode in which the alienation may take place and makes the gift over fail or take effect, accordingly as the alienation

[1] (1830) 10 B. & C., 433; 34 R. R., 469; *see* also *Shaw* v. *Ford* (1877), 7 Ch. D., 669 (674).

[2] *Willis* v. *Hiscox* (1839), 4 Myl. & Cr., 197 (202).

[3] *Hood* v. *Oglander* (1865), 34 Beav., 513.

[4] (1875) L. R., 20 Eq., 186.

[5] *Re Rosher* (1884), 26 Ch. D., 807.

is by deed or by will.[1] This naturally leads us to an examination of the validity of gifts over upon intestacy. There are dicta of eminent Judges and also express decisions to the effect, that if there is a devise to *A* in fee, and if *A* dies without having disposed of the land by deed or will, then over to *B*, it is bad. It is not easy at first sight to say why this should be so; the owner of the land has full power of alienation, either by deed or by will; it rests entirely with him to say, whether the gift over shall take effect or not, and, what illegality is there in an executory devise, depending on *A's* not making a deed or will, if he has the power of making one, should he so wish? In the case of a gift over of what is left undisposed of by the first taker, when the gift is of a sum of money, it has been held, that the gift is bad for uncertainty and the difficulty, if not the impossibility, of determining the subject-matter of the gift over.[2] But

Reason for invalidity.

Henderson v. *Cress* (1861), 29 Beav., 216; *Perry* v. *Merrit* (1874), L. R., 18 Eq., 152; *Bowes* v. *Goslett* (1858), 27 L. J. Ch., 249. The contrary view was apparently taken in *Stevenson* v. *Glover* (1845), 1 C. B., 448, which was dissented from by Turner, L. J., in *Holmes* v. *Godson* (1856), 8 DeG. M. & G., 152 (156).

[2] *Lightborne* v. *Gill* (1764), 3 Brown, P. C., 250; *Bull* v. *Kingston* (1816), 1 Mer., 314; *Ross* v. *Ross*, (1819), 1 J. & W., 154; *Cuthbert* v. *Purier* (1822), Jac., 415; *Bourn* v. *Gibbs* (1831), 1 Russ. & Myl., 614; *Phillips* v. *Eastwood* (1835), Ll. & G. temp. Sug., 270 (297); *Green* v. *Harvey* (1842), 1 Hare, 428; *Re Yalden* (1851), 1 DeG. M. & G., 53; *Re Mortlocks Trust* (1857), 3 K. & J., 456; *Barton* v. *Barton* (1857), 3 K. & J., 512; *Weale* v. *Olive* (1863), 32 Beav., 421; *Re Wilcocks' Settlement* (1875), 1 Ch. D., 229. *See* also *Watkins* v. *Williams* (1851), 3 Mac. & G., 622 (629), where Truro, L. C., observed: "It is a rule that where a money-fund is given to a person absolutely, a condition cannot be annexed to the gift, that so much, as he shall not dispose of, shall go over to another person. Apart from any supposed incongruity, a notion which savours of metaphysical refinement, rather than of anything substantial, one reason which may be assigned in support of the expediency of this rule, is, that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not; since, if the person to whom the absolute interest is given, left any personalty, it might be wholly uncertain, whether it were part of the precise fund which was the subject of the condition or not. Another reason may be, that it would be contrary to the well-being of the party absolutely entitled, to lead him profusely to spend all that was given him, which in many cases might be all that he had in the world."

the difficulty of identifying the undisposed of balance, does not apply to cases of gifts of immoveable property, and if a devise over of land, upon the intestacy of the first taker, is to be deemed bad, some other reason must be found for the conclusion. One such reason was attempted to be given in an old case, decided in the Common Pleas in 1746, but not reported till 1856[1]; there Burnett, J., held, that a gift over upon the death of the testator's children (to whom the estate was given) without leaving issue, and without appointing the disposal of the same was bad, and observed: "The condition here is that if the testator's son dies without issue, his heir shall not take by descent, but by appointment, whereas a devise to a man's heir-at-law or grant to heirs, is void, and he will take by descent; the condition therefore is void." This reasoning would hardly find acceptance at the present day, and a devise to a man's heirs, although they took by descent, would be a sufficient disposal to prevent the gift over taking effect. In a later case,[2] where Knight Bruce and Turner, L. JJ.,

Gulliver v. *Vaux.*

[1] *Gulliver* v. *Vaux* (1746), 8 DeG. M. & G., 167. See *Stevenson* v. *Glover* (1845), 1 C. B., 448, where the contrary view was taken in ignorance of the decision in *Gulliver* v. *Vaux* which had not then been reported. It may be pointed out that the rule in Scotch law is different, inasmuch as if there is an absolute gift to *A* and his heirs, followed by a declaration that if *A* dies childless and intestate, the estate shall go to others, the gift over is valid; see *Barstow* v. *Black* (1868), L. R., 1 H.L. (Sc.) 392, where Cairns, L. C., observed: The position of an unlimited fiar (owner) with a conditional gift over is unknown to the English law; but the position of an unlimited fiar—that is, a fiar with unlimited power of ownership and disposition, followed by substitutions or limitations over—is well-known to the Scotch law. It would, in my opinion, have been a perfectly good disposition to settle these estates on *A*, his heirs and assigns with a limitation to other persons in the event of *A* dying childless. Under such a settlement *A* would have had an absolute power of disposition over the estates. And, in my opinion, the words of apparent contingency, 'in the event of his not disposing of the estates,' are no more than a recognition of that power of disposition which was by Scotch law inherent in the estate given to *A*."

[2] *Holmes* v. *Godson* (1856), 8 DeG. M. & G., 152. *See* also *Barton* v. *Barton* (1857), 3 K. & J., 512; *Bowes* v. *Goslett* (1858), 27 L. J. Ch., 249. *Re Wilcocks' Settle-*

Holmes v. Godson.

held that a gift over, if a devisee, or legatee, to whom an absolute interest is given, does not dispose of his interest or dies intestate, is void both as regards realty and personalty, the reason for the rule was thus stated: "The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this disposition tends directly to contravene the law and to defeat the policy on which it is founded; on principle, therefore, I think the disposition bad." In a still later case,[1] Fry, J., accepted the law as stated above, but declined to enquire into the logical sufficiency of the reason given. The learned Judge, however, went on to give a reason for the invalidity of gifts over on intestacy, and if the doctrine is to be maintained, this is the least unsatisfactory reason I have seen advanced in support of it: "Any executory devise which is to defeat an estate and which is to take effect on the exercise of any of the rights incident to that estate, is void. Of this, a devise over upon alienation is an instance, and so also is a devise upon not alienating; for the right to enjoy without alienation is as much an incident to the estate as the right to alienate. Consequently, where land is devised to several as tenants-in-common, with a proviso, that, if one died before partition, his share shall go over, the gift over is void, because the right of tenants-in-common to hold their interests undivided, is an incident of the estate."[2] The development of this rule with regard to the invalidity of gifts over on intestacy, furnishes an interesting example of what may be called reversion to a primitive type. In the earliest stages of the development of legal conceptions, Courts very often frustrate the

Shaw v. Ford.

Fry, J.

ment (1875), 1 Ch. D., 229. Cf. *Attorney-General* v. *Ailesbury* (1887), 12 App. Cas., 672 (694), where Lord Macnaghten said: "you cannot give real estate in fee and say that on the death of the owner intestate, it shall go to his next of kin."

[1] *Shaw* v. *Ford* (1877), 7 Ch. D., 669.

[2] *Per* Fry, J., in *Shaw* v. *Ford* (1877), 7 Ch. D., 669 (674).

intention of parties to transactions by means of rules which are not founded on public policy, but are essentially formal and arbitrary. With the progress of jurisprudence, however, we always find Courts ready to carry out the intentions of parties and to remove fetters the existence of which cannot be justified on grounds of public policy. In the present instance, however, we find that the Courts have laid down a rule which is of very doubtful propriety and which thwarts the intentions of parties. The truth seems to be that whichever reason we may take, whether we say that the gift over is bad because it is repugnant or that the passage of a fee-simple on death of a tenant intestate, to the heir, is a necessary incident of the estate, or that an executory devise contingent upon a circumstance which it is in the power of the first taker to avoid, is invalid—whichever of these views we accept, we really do not find any substantial reason for the rule, and there is nothing to shew what interests are forwarded by it and how it advances the moral or material well-being of the community.

Reversion to a primitive type.

We shall next consider the validity of restraints on alienation in relation to estates for life. Under the English law, it seems to be well settled, that a provision in the gift of a life-estate or interest, that the estate or interest shall cease or shall go over to a third person, upon alienation, voluntary or involuntary, of the life-estate or interest, is good. This appears to have been first held in 1733 in *Lockyer* v. *Savage*,[1] where it was placed on the analogy of conditions against alienation in leases for years, and as appears from numerous recent cases,[2] is settled beyond dispute. There is clearly

Forfeiture upon alienation of life-estates.

Lockyer v. *Savage.*

[1] (1733) 2 Strange, 947. The only point discussed in modern cases is whether such a clause includes a bankruptcy existing at the date of the will; see *Trapper* v. *Meredith* (1871), L. R., 7 Ch. App., 248; *Metcalfe* v. *Metcalfe* (1891), 3 Ch., 1; *West* v. *Williams* (1899), 1 Ch., 132.

[2] *Metcalfe* v. *Metcalfe* (1889), 43 Ch. D., 633; (1891) 3 Ch., 1; *Dommett* v. *Bedford* (1796), 6 T. R., 684; *Shee* v. *Hale* (1807), 13 Ves., 404; *Rochford* v. *Hackman* (1852), 9 Hare, 475; *Manning* v. *Chambers* (1847), 1 DeG. & Sm., 282; *Carter* v. *Carter* (1857), 3 K. & J., 617; *Craven* v. *Brady* (1867), L. R., 4

a distinction between the gift of an estate in fee and a gift of an estate for life; in the case of the former, it is of the essence of the estate, that it confers free power of alienation; in the case of the latter, it may well be maintained, that the intention of the testator was that the legatee shall partake of his bounty, provided only that permanent enjoyment be secured; and there seems no reason why such intention should be defeated. I may add that a gift to be defeated by alienation need not take the form of a gift till alienation, but may be an out and out gift, with a proviso for a gift over on alienation.[1]

Settlement on owner himself.

We have seen now that conditions or limitations against or on alienation, may be attached to life interests given to others, and that the alienation aimed at may be either voluntary, as by sale, or involuntary, as by bankruptcy. We have next to consider how far this rule is applicable, when the life-tenant happens to be the settlor himself; in other words, the question is, how far a man may settle property on himself for life, to go over on his alienation. It is manifestly against public policy that a man should be allowed to settle property on himself till he voluntarily alienates it and to provide that upon such voluntary alienation, it should go over; a man cannot be allowed to covenant, that if he sells his estate, the purchaser shall not have it, but it shall go to a trustee who is to apply the rents and profits for the benefit of the vendor and his family.[2] Similarly, it is deemed against

Eq., 209; (1869) 4 Ch. App., 296; *Exp. Eyston* (1877), 7 Ch. D., 145; *Hurst* v. *Hurst* (1882), 21 Ch. D., 278; *Nixon* v. *Verry* (1885), 29 Ch. D., 196; *Re Levy's Trusts* (1885), 30 Ch. D., 119; *Robertson* v. *Richardson* (1885), 30 Ch. D., 623.

[1] *Wilkinson* v. *Wilkinson* (1819), 3 Swanst., 515. It has sometimes been said, however, that though a limitation over of a life estate on alienation is good, a condition without a gift-over is not; *Stroud* v. *Norman* (1853), Kay, 313 (330), *per* Wood, V.C. But, as pointed out by Turner, V.C., in *Rochford* v. *Hackman* (1852), 9 Hare, 475, this is based upon a misapprehension of Lord Eldon's observations in *Brandon* v. *Robinson* (1811), 18 Ves., 429. *See* also *Joel* v. *Mills* (1857), 3 K. & J., 458; *Pearson* v. *Dolman* (1866), L. R., 3 Eq., 315 (320).

[2] *Phipps* v. *Ennismore* (1827), 4 Russ., 131. The contrary view taken in *Knight* v. *Brown* (1861), 30 L. J. Ch., 649; and *Re Detmold*

public policy to allow a man to settle property on himself until his death or bankruptcy and then over ; in other words, the rule forbids a man, even for good consideration, to make a grant over of his life interest, contingent on his bankruptcy, as a condition precedent. If he reserves a life interest, it will go to his assignees on bankruptcy in spite of the condition or limitation, even though the gift over, after his death, is valid because made on good consideration.[1]

Alienation of estates for years.

Lastly, we have to consider the validity of restraints on alienation, in relation to estates for years. Under the English law, a condition or conditional limitation on alienation, attached to an estate for years, is valid, and it seems to be well settled that forfeiture may take place on involuntary alienation, for instance, on bankruptcy.[2] But if a lessee for years transfer his whole interest, he cannot put any condition against alienation in the assignment, for there is no tenure between him and the assignee.[3]

Principles of construction.

I may observe that although it is undoubtedly the duty of the Court to give effect to the intention of the testator as far as the rules of law will permit, yet if a testator uses words which by their plain import give an absolute estate, the circumstance that he confers the same absolute estate upon a succession of legatees in a manner incompatible and inconsistent with the estate plainly given to the first, will not authorise the Court to alter the effect of the words by which that estate is given : in other words, if an absolute interest be given upon an express condition, which may be lawful in itself but is incompatible with the free enjoyment of the property, the Court will not modify the absolute interest with a view to give

(1889), 40 Ch. D., 585, can hardly be justified on principle.

[1] Most of the cases have arisen on marriage settlements. See *Higinbotham* v. *Holme* (1811), 19 Ves., 88 ; *Lester* v. *Garland* (1832), 5 Sim., 205 ; *Exp. Oxley* (1807), 1 Ball & B., 257 ; the limitation over is void, even though it is not for the benefit of the settlor's wife and children, see *Exp. Vere* (1812), 19 Ves., 93 (99) ; *Synge* v. *Synge*, 4 Ir. Ch., 337.

[2] Dyer 6, 45, 66, 79, 152 (1536—1558); *Roe* v. *Galliers* (1787), 2 T. R., 133.

[3] Co. Lit., 223*a*.

effect to the condition, but will declare the condition void in order to support the absolute interest.[1]

Transfer of Property Act, Sec. 10.

We shall conclude this lecture with an examination of this topic under Anglo-Indian law. It may be stated generally that the principles deducible from the English cases, are applicable in this country to questions relating to the conditions under which alienation of property may be restrained. Section 10 of the Transfer of Property Act provides that, "where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him, from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him; provided that, property may be transferred to or for the benefit of a woman, not being a Hindu, Muhammadan or Buddhist, so that she shall not have power, during her marriage, to transfer or charge the same or her beneficial interest therein." You will not fail to observe, that although this section renders void all conditions which absolutely restrain the transferee from disposing of property, it is wholly silent as to the validity of qualified restraints on alienation; and it may be assumed that if a given condition does not violate the provisions of this as also of the two succeeding sections, its validity will have to be tested by the same principles as under the English law. At the same time, it must be remembered, this provision of the Statute did not introduce any novel doctrine into Indian law, but only crystallized what had been understood to be the law on the subject in a long series of cases.[2]

[1] *Byng* v. *Strafford* (1843), 5 Beav., 558; 12 L. J. Ch., 169; confirmed on appeal *Hoare* v. *Byng* (1844), 10 Cl. & F., 508 (524), 8 Jur., 563.

[2] *Sonatun Bysack* v. *Joggut Sundari* (1859), 8 Moore I. A., 76; *Chunder Nath* v. *Gobinda Nath* (1872), 11 B. L. R., 112; *Tagore* v. *Tagore* (1872), 9 B. L. R., 377; *Bhairo* v. *Parmeshri* (1884), I. L. R., 7 All., 516; *Mahram* v. *Ajudhia* (1886), I. L. R., 8 All., 453; *Amiruddulah* v. *Nateri* (1871), 6 Mad. H. C., 356; *Kristna* v. *Shunmuga* (1871), 6 Mad. H. C., 255; *Anantha* v. *Nagamuthu* (1881), I. L. R., 4 Mad., 200.

Restraint on alienation in case of mortgages.

One of the commonest cases in this country in which restraints on alienation are found, is a mortgage of immoveable property. Mortgagors frequently covenant, not to sell absolutely or to deal with in any other manner, the property included in the mortgage transaction. Such a covenant does not clearly operate to invalidate any subsequent alienation of the property, although the transfer in contravention of the covenant may be voidable, only in so far as it defeats the mortgagee's rights. In a recent case[1] in Calcutta, where a mortgagor, in contravention of a covenant in a mortgage deed not to alienate or charge in any way the mortgage premises, subsequently granted a zeripeshgi lease, it was held that the covenant did not render the lease invalid and did not entitle a purchaser, at a sale in execution of the decree on the basis of the mortgage, to maintain an action for ejectment against the lessee; Sir Richard Garth, C. J., pointed out, that the only course open to the purchaser, was to bring a suit against the lessee to have his right declared to sell the property to satisfy his mortgage debt, so as to give the lessee an opportunity to redeem. The same view was taken by Mahmood, J., in a later case,[2] in which that learned Judge held, that a transfer of mortgage property in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee, and with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee.

Garth, C. J.

Mahmood, J.

Exceptions.

You will have noticed that sec. 10 of the Transfer of Property Act refers to two exceptions from the general

[1] *Radha Prosad* v. *Monohur* (1880), I. L. R., 6 Cal., 317.

[2] *Ali Hasan* v. *Dhirja* (1882), I. L. R., 4 All., 518. *See* also *Chunni* v. *Thakurdas* (1875), I. L. R., 1 All., 126; *Mulchand* v. *Balgobind* (1878), I. L. R., 1 All., 610; *Lachmin* v. *Koteshar* (1880), I. L. R., 2 All., 826; *Ram Saran* v. *Amrita* (1880), I. L. R., 3 All., 369, which are discussed, and explained by Mahmood J., in his judgment. *See* also *Venkata* v. *Kannam* (1882), I. L. R., 5 Mad., 184, in which it was suggested, that the various decisions could be reconciled only on the view that the condition binds a purchaser for value, if he has notice of it.

rule. In the first place, the section provides that it is permissible for a lessor to fetter the liberty of alienation which the lessee would otherwise possess, and this principle is applicable even to grants of permanent leases.[1] It must be pointed out, however, that if a clause in a lease merely stipulates that the lessee shall not transfer his interest to any third person, and that such transfer shall be void, but does not reserve a right of re-entry, it is apparently inoperative, inasmuch as it cannot be said to be a condition for the benefit of the lessor.[2] In the absence of an express provision for re-entry, the breach of a covenant not to alienate or sub-let without the landlord's consent, may give rise to an action for damages.[3] In the second place, the section makes an exception in favour of married women, other than Hindus, Muhammadans and Buddhists. The effect of this proviso is merely to except from the general rule laid down in the section, the particular case of a married woman; it does not give to a restraint upon alienation, any greater validity than it possessed before the Act.

Leases.

Married women.

A covenant against alienation refers ordinarily to an alienation by act of parties and does not consequently affect an assignment by operation of law, for example, by a sale in execution of a decree; if, however, there are express words, referring to involuntary alienation, effect will be given to them.[4]

Involuntary alienation.

[1] *Vyankatraya* v. *Shivram* (1883), I. L. R., 7 Bom., 256 (260).

[2] *Nilmadhub* v. *Narattam* (1890), I. L. R., 17 Cal., 826; *Golak Nath* v. *Mathuranath* (1891), I. L. R., 20 Cal., 273. It has been held, that a power of entry reserved does not apply to the breach of a negative covenant, such as a covenant not to assign the premises without the lessor's consent; see *West* v. *Dobb* (1870), L. R., 5 Q. B., 460; *Hyde* v. *Warden* (1877), 3 Ex. D., 72.

[3] *Lepla* v. *Rogers* (1893), 1 Q. B., 31; where a lessee, in breach of a covenant not to assign or sub-let without the consent of his lessor, sub-let the premises to a person for use as a turpentine distillery; he was held liable for damages, as the premises were burnt down by a fire in consequence of the use for the business for which they had been taken.

[4] *Vyan Katraya* v. *Shivram*, (1883), I. L. R., 7 Bom., 256; *Tamaya* v. *Timapa* (1883), I. L. R., 7 Bom., 262; *Subbaraya* v. *Krishna* (1882), I. L. R., 6 Mad., 159; *Re West Hopetown Co.* (1890), I. L. R., 12 All., 192.

Section 11 of the Transfer of Property Act provides as follows: "Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner." The rule laid down in this section, is in substantial agreement with the principle deducible from English cases, and I need only call your attention to some illustrations from our law. Thus it has been held, that an agreement made on a division of a family property, restricting the right of the parties to dispose of it if they should die without issue, is void, as it practically takes away one of the most important legal incidents of the property.[1] Similarly, it has been held, that a provision in a will, the effect of which is to postpone partition, is inoperative.[2] But where, on a partition, the parties agree not to alienate their shares, it has been doubted whether it may not bind the parties themselves, though it might not bind their descendants or purchasers from them.[3]

Transfer of Property Act, Sec. 11.

Restraint upon partition.

The proviso to the section treats of the very important question of restrictive covenants, the discussion of which hardly falls within the scope of the present lecture. Upon general principles, it is not competent to a grantor to create rights unconnected with the use or enjoyment of

Restrictive covenants.

[1] *Venkataramana* v. *Brammana* (1869), 4 Mad. H. C., 345; *Rajender* v. *Sham Chand* (1880), I. L. R., 6 Cal., 106; *Ramlinga* v. *Verupakshi* (1883), I. L. R., 7 Bom., 538.

[2] *Makoonda* v. *Ganesh* (1875), I. L. R., 1 Cal., 104.

[3] *Venkataramanna* v. *Bramanna* (1869), 4 Mad. H. C., 345; *Anand Chundra* v. *Pran Kristo* (1869), 3 B. L. R., O. C. J., 14; *Ramdhone* v. *Anand Chunder* (1864), 2 Hyde, 93; *Rajender* v. *Sham Chand* (1880), I. L. R., 6 Cal., 106; *Ramlinga* v. *Virupakshi* (1883), I. L. R., 7 Bom., 538; in which last case it was held, that even the parties thereto are not bound by such an agreement.

land and annex them to it[1] so as to constitute a property in the grantee. But restrictions may be imposed on the power to deal with one property with a view to the improvement or better enjoyment of another property. In a recent case before the Privy Council[2] the owner of some land had sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land should never be sold, but left open for the common benefit of both parties and their successors; it was held that a perpetual restriction upon the sale of the land was invalid, but that the agreement to leave the open space for the common advantage of both parties did not contravene any rule of law and entitled the person who held the vendee's land to enforce the obligation against the person who held the vendor's land. You must remember, however, that even such a restrictive covenant may cease to be enforceable, if the character of the property sold so changes as to make the restriction unjust and unreasonable.[3]

McLean v. McKay.

Transfer of Property Act, Sec. 12.

Section 12 of the Transfer of Property Act treats of the validity of conditions making an interest determinable on insolvency or attempted alienation, and provides as follows: "Where property is transferred, subject to a condition or limitation, making any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void. Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him." The rule laid down in this section is in substantial agreement with the principles of English law as I have already explained them to you, and really forms

[1] *Ackroyd* v. *Smith* (1850), 10 C. B., 164; where it was held that a right of way cannot be granted, so as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant.

[2] *McLean* v. *McKay* (1873), L. R., 5 P. C., 327.

[3] *Duke of Bedford* v. *Trustees of the British Museum* (1822), 2 Myl. & K., 552; *Doherty* v. *Allman* (1878), 3 App. Cas., 709 (730).

an exception to the general rule laid down in secs. 31 and 32, that it is competent to a grantor to annex a condition subsequent upon the happening of which the grant shall be defeated.[1] But I must point out to you, that as a condition framed with the object of defeating the creditors of the transferee, when he becomes insolvent, is void, the property would pass to the assignee in insolvency. A different rule, however, seems to be deducible from sec. 107, ill. (g) of the Indian Succession Act: "An estate is bequeathed to *A* until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to *B*. *B's* interest in the bequest is contingent until *A* takes advantage of the Act." Transfer of Property Act. Sec. 12.

Here I must bring to a close my series of lectures on the law of perpetuities in this country. It has been my constant endeavour to present to you not merely the precepts of the law as they are, but also the reasons for their present form. This process, by which we trace legal rules and formulas to the first principles that lie at the foundation of our system of jurisprudence, may occasionally appear to be dry and uninteresting; but once you are familiar with it, let me assure you, you will find nothing more stimulating to your intellect. Never forget, that, in the words of one of the foremost jurists of this generation, law is neither a trade nor a solemn jugglery, but a true and living science. It may not be open to every one of you to attain eminence in the practice of your profession like the sergeant who lives immortal in the pages of the poet, and of whom it is said: Conclusion.

> "For his science, and for his heigh renoun,
> Of fees and robes hadde he many oon.
> In termes hadde he caas and domes alle,
> That from the tyme of King William were falle."

But it is open to each and every one of you to love law as a science and to feel the full dignity of being a minister at its altars. Endeavour, therefore,

[1] See *Hormusji* v. *Dadabhai* (1895), I. L. R., 20 Bom., 310, where the leading English authorities were discussed, as the provisions of the Transfer of Property Act were not applicable.

not to gather legal formulas, to be applied as the interest of this or that litigant may require, but to trace out legal principles from their first dim lights and paly glimmers, till they stand embodied before you with a clear and steady brightness. If you leave not this path, your forensic arguments are bound to be distinguished for masculine sense, solid reasoning and forcible illustration; and, what is more, you will avoid what has been described by one of the most venerated thinkers of modern England as the inevitable operation of legal studies and practice, namely, that "they sharpen, indeed, the intellect, but like a grindstone, narrow whilst they sharpen."

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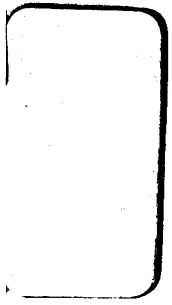
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